In the Supreme Court of the United States

OCTOBER TERM, 1940.

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Petitioners,
vs.
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Respondents.

10-11
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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ABBREVIATIONS.

The following abbreviations (except quotation marks) will be used by the City of Indianapolis and the individual members of the Boards of Trustees and Directors in their brief:

City of Indianapolis when referred to alone:	"City"
City of Indianapolis and the individual members of the Boards of Trustees and Directors when referred to collectively:	"Petitioners"
The Chase National Bank of the City of New York, Trustee, when referred to alone:	"Chase"
Citizens Gas Company of Indianapolis when referred to alone:	"Citizens Gas"
The Indianapolis Gas Company when referred to alone:	"Indianapolis Gas"
When Chase, Citizens Gas and Indianapolis Gas are referred to collectively:	"Respondents"
The Ninety-nine year lease of September 30, 1913, between The Indianapolis Gas Company, Lessor, and Citizens Gas Company, Lessee:	"99 year lease"
Circuit Court of Appeals for the Seventh Circuit:	"Circuit Court of of Appeals."

NOTE: This brief of City of Indianapolis, *et al.*, is submitted for all four cases, viz: 421 and 422, in which writs of certiorari were granted petitioners, and 423 and 424 in which writs of certiorari were granted Chase on its cross-petition.

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BRIEF OF CITY OF INDIANAPOLIS, ET AL. PETITIONERS AND CROSS-RESPONDENTS.

THE OPINIONS BELOW.

The District Court in 1937 dismissed Chase's bill of complaint for want of jurisdiction. No written opinion was filed or given. (R. 271.) An appeal from this ruling was taken by Chase. The majority opinion of the Circuit Court of Appeals which reversed the lower court is reported in 96 F. 2d 363-368. (R. 285-292.) The dissenting opinion appears in 96 F. 2d 368. (R. 293.)

A petition for rehearing was overruled without opinion, and this Court denied certiorari. (305 U. S. 600, 83 L. ed. 381.)

A trial was then had in the District Court on the merits in respect of a portion of the case.

The District Court ordered that evidence should be heard upon the issues as to whether the lease is binding upon and enforceable against the City "with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis by its answer, for claimed unenforceability of such lease against it or its said property, viz: that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust * * *." (II R. 321, 322.) No objection or exception was made or taken by any party. The memorandum opinion of the District Court on that portion of the merits determined is unreported, but appears in the record at pages 1122 to 1159. Chase appealed; Indianapolis Gas cross-appealed. The opinion of the Circuit Court of Appeals reversing the lower court is reported in 113 F. 2d 217-232. (IV R. 1281-1306.) The Circuit Court of Appeals amended its opinion in certain particulars after the opinion was first filed. (IV R. 1335.) No written opinion was given or filed in denying petitioners' petition for rehearing addressed to the opinion of the Circuit Court of Appeals as modified. (IV R. 1405.) Certiorari was granted by this Court on October 28, 1940.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229. (43 Stat. 938; 23 U. S. C. A. Sec. 347.)

Writs of certiorari were granted in each of the cases by this Court on October 28, 1940.

STATEMENT OF THE CASE.

This is a suit in equity commenced by Chase against the City and the individual members of its Board of Trustees and Directors for Utilities impleaded with Indianapolis Gas and Citizens Gas.

Chase as trustee (I R. 4) under a mortgage to secure bonds executed (I R. 4) sought as its main relief a declaration that a lease for 99 years (I R. 5, 6, 21) executed by Indianapolis Gas, lessor, to Citizens Gas, lessee, was binding upon and enforceable against the City, as successor trustee of a public charitable trust (I R. 20, 21, 22), as a claimed assignee of the lease (I R. 16, 17) and allegedly because of laches (I R. 12), estoppel (I R. 18, 19) and *res adjudicata*. (I R. 8, 9, 10, 11.)

Chase also sought an injunction requiring the City to make payments and perform covenants under the lease (I R. 21, 306); judgment for unpaid interest and interest on overdue interest on the bonds (I R. 21, 301), together with attorney's fees and expenses. (I R. 27.)

Among other things, Chase asked as relief against Indianapolis Gas, that the lease be declared valid, and that pending final hearing, Indianapolis Gas be enjoined from attempting to impair the lease as security. No action in respect of the injunction was taken by Chase except the request made in its complaint. (I R. 21.)

In earlier litigation, the property owned by Citizens Gas was held to be the corpus of a public charitable trust created for the benefit of the gas users of the City.[1]

The historical background of the public charitable trust which is involved in this litigation is as follows:[1]

In 1886 certain public spirited citizens of Indianapolis organized Consumers Gas Trust Company to furnish natural gas to the City and its inhabitants.

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[1] *Todd v. Citizens Gas Company*, 46 F. 2d 855.

The articles of association of the company provided that after the certificate-holders[2] had been paid the amount of their stock subscriptions with interest at 8% per annum and after payment of all the company's indebtedness "it shall be the duty of the directors * * * to reduce the price of gas so that * * * (it) shall thereafter be supplied to consumers at cost."

The Consumers' Company conducted its business until 1904 when natural gas failed. Certificate-holders had then received 95% of the amount of their subscriptions plus 8% dividends per annum. The officers then proposed to pay the certificate-holders the remaining 5% and thereafter engage in the manufacture of *artificial gas and distribute it at cost.*

Byron C. Quinby, a stockholder, brought suit in the Federal Court at Indianapolis (February 1904) which was appealed to and decided by the Circuit Court of Appeals.[3]

The direct result of the *Quinby* decision was that the gas users of the City could not obtain from the Consumers' Company a supply of gas at cost, the City lost any beneficial interest in the property, and the stockholders of the Consumers' Company who had received a return of 95% of their investment owned the entire beneficial interest in the property.

This situation led directly to the creation of the public charitable trust known as Citizens Gas Company, one of the

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[2] The stock was issued to voting trustees and certificates of beneficial ownership issued by the trustees to the subscribers.

[3] *Consumers Gas Trust Company vs. Quinby* (C. C. A. 7) 137 Fed. 882. The Court held: (1) the company was organized for the sole purpose of furnishing natural gas to the city and its inhabitants; (2) no public charitable trust had been created in the property; (3) the manufacture and sale of artificial gas was *ultra vires* the corporation; and (4) that since the supply of natural gas had failed, the stockholders were entitled to have the corporate business wound up and the net assets distributed to them.

purposes of which was to furnish competition to the then existing privately owned property of Indianapolis Gas.[4]

The plan of the public charitable trust for the benefit of the gas users of the city was carried forward in two steps. The first was the franchise contract of August 25, 1905. (I R. 81-116.) This franchise contract was the basis of the public charitable trust and outlined the plan of its creation.

The individuals named in the franchise were not authorized to exercise any rights in the city streets. There was no grant of franchise, license or permit to them. It was required that before a gram should become effective, that a corporation be organized which, by declaration in its charter, should fix the rights of its stockholders and of the city in the property to be acquired to carry out the purpose of the grant. (I R. 82.)

There was no grant of rights in the city streets except to a corporation which, by voluntary act of all its stockholders, should declare, in advance, that the property acquired with the money contributed by them should be held under the obligation of the corporation to convey it to the city when the contributions with interest had been returned and thereupon the rights of the stockholders would be extinguished. (I R. 84, 99).

This led to the next step in the plan: the incorporation of the Citizens Gas Company.

It was a quasi-public corporation. Its sole purpose was to act as trustee of a public charitable trust. It had no power or authority to act otherwise. (I R. 82-85, 93.)

The Articles of Incorporation provided that all of the capital stock of the company should be held by trustees (I R. 96, 113), one of whom should be named by the mayor

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[4] The purpose of all parties in the negotiation leading up to the passage of the franchise ordinance (I R. 81-116) of August 25, 1905, by the Board of Public Works and its ratification by the City Council and the organization of Citizens Gas was to avoid the mistakes which had resulted in the *Quinby* decision.

of Indianapolis. (I R. 96, 113.) They were given full, complete and irrevocable power during the life of the corporation to hold and vote the stock as though they were the owners of it. (I R. 96.) They were to name and select members of the board of directors. (I R. 98.)

Certificates of beneficial interest were issued to the owners of the stock for their shares. These certificates were assignable and entitled the holders to all dividends paid on the shares. (I R. 97.) Upon the expiration of 25 years, and when the certificate-holders had received an amount equal to the par value of their shares with certain specified interest, the certificates were to be deemed fully paid and canceled and the trustees and directors were then to convey the physical property to the City to be held and operated by it for the benefit of its gas users. (I R. 98.)

All the rights, property and assets acquired by Citizens Gas were acquired for the benefit of the gas users subject only to a charge in favor of the stockholders, creditors and others having valid claims against the corporation or its property. (I R. 98, 99.)

At all times from its creation in 1906, Citizens Gas was the initial trustee of a public charitable trust for the benefit of the gas users of the City.

On September 30, 1913, a lease was executed by Indianapolis Gas, lessor, to Citizens Gas, lessee for a term of 99 years (I R. 51-80, 55, 77), or if for any reason the lease should be held invalid because of the length of the term then for the longest term for which the parties might lawfully contract. (I R. 80.)

As rental Citizens Gas was to pay until 2012, the end of the term, sums equal to (1) 5% interest on the outstanding bonds (being the bonds for which Chase is trustee (I R. 69, 79)) which now amount to $6,881,000; (2) 6% on the par value of the common stock of which there is outstanding $2,000,000; (3) all taxes for which Indianapolis Gas would become liable; and (4) certain additional miscellaneous expenditures.

The payments so made by Citizens Gas from 1913 to September 9, 1935, aggregated more than $11,500,000 and were at the average annual rate of more than $520,000. (II R. 669, offered II R. 327.)

Shortly prior to the execution of the lease in September, 1913, the Shively-Spencer Act which created the Public Service Commission of Indiana was enacted and became effective.[5]

This act required that leases, such as that between Indianapolis Gas and Citizens Gas, be submitted to the Commission for its approval. This was done upon a joint petition of both lessor and lessee, and the lease was approved.

Frank S. Fishback, a stockholder of Citizens Gas, intervened before the Public Service Commission and later commenced an action in the Marion Superior Court to set aside the Commission's order approving the lease. From an adverse judgment Fishback appealed to the Supreme Court of Indiana which dismissed the case because the appeal had not been perfected in time.[6]

On March 20, 1929,[7] the City, by resolution of its Board of Public Works (II R. 670, offered II R. 327) declared its intention to take over the right, title, interest and ownership which was then held by Citizens Gas, and to

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[5] Chapter 76, Acts of Indiana General Assembly, 1913, p. 167.

[6] *Fishback vs. Public Service Commission*, 193 Ind. 282. Chase bases in part its claim of *res adjudicata* on the Commission's action approving the lease and on the *Fishback* case. Both are dealt with more fully in this brief in the argument. (*Infra*, pp. 67, 72.)

[7] This was nine days after Chapter 77, Acts of the Indiana General Assembly 1929, p. 252, became effective by which the Department of Utilities of the City of Indianapolis was created and by which the Board of Directors for Utilities was given *exclusive* control over the gas plant and property of the department.

exercise its rights as successor trustee of the public charitable trust.

Newton Todd, a stockholder of Citizens Gas, on April 30, 1929, commenced an action in the Federal District Court at Indianapolis. (Clause 13, II R. 628, 629, offered II R. 327.) Citizens Gas, the City, and the members of its Board of Public Works were among the defendants. Todd sought to enjoin Citizens Gas and its co-defendants from carrying into effect the resolutions theretofore adopted in which the existence of the public charitable trust had been recognized and the right of the City acknowledged to take over the property of Citizens Gas as trustee, pursuant to the terms of the franchise.[8]

While the *Todd* case was still pending, Allen G. Williams, on March 12, 1930, filed suit in the Superior Court of Marion County. (Clause 14, II R. 630, 631, offered II R. 327.) Having been decided against plaintiff the case was appealed.[9]

The Indiana Supreme Court said respecting the nature of this suit that it was:

"a suit by appellant Williams to establish a trust; to quiet title to property of the trust estate; to recover di-

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[8] There was in issue in the *Todd* case for the first time the question of whether or not a public charitable trust was created by the franchise and related instruments executed in 1905. A public charitable trust was held to exist. *Todd v. Citizens Gas*, 46 F. 2d 855. Chase also relies on the *Todd* case as being *res adjudicata*. (I R. 13.) Further reference to this case is made hereafter in this brief. (*Infra*, p. 75.)

About two weeks after the *Todd* case was filed, one Cotter and others commenced an action in the Federal District Court. Chase apparently places some reliance on the *Cotter* case as *res adjudicata* (Br. pp. 12, 13, 14) but Chase did not plead the *Cotter* case.

Chase also places reliance on the City's answer in the *Cotter* case. (Br. pp. 103, 124, 125.) The validity of the lease was not in issue there and the answer was unverified and signed only by counsel. (*Infra*, p. 79.)

[9] *Williams v. Citizens Gas Co.*, 206 Ind. 448. By agreement the *Williams* case was not tried until final decision of the *Todd* case. (Clause 13 f II R. 629, 630, offered II R. 327.)

verted assets of the trust estate; to recapture the trust and its property from delinquent and insolvent trustees and sequester the same with receiverships; to administer the trust during an emergency and at the end of the emergency turn over the trust and its property to its lawful beneficiaries."[10]

On July 23, 1935, the City, through its attorneys, notified Indianapolis Gas that various provisions of the lease were inappropriate and burdensome, that it was not binding on the City but that the City would be willing to enter into negotiations looking towards a revision of the lease. (P X 58, III R. 836, offered II R. 329.) See also City's Stip. X 68, III R. 970.

No answer having been received to the July 23 letter, counsel for the City wrote Indianapolis Gas again on August 31, asking if the City was to be permitted temporarily to use the Indianapolis Gas property for six months after the take-over. (P X 59, III R. 836, offered II R. 329.)

On September 30, 1935 Indianapolis Gas agreed to make an arrangement for temporary use. (P X 66, III R. 838, offered II R. 329.) (Stip. X 65, III R. 969, offered II R. 434.)

On August 27, 1935, Mr. William Sparks, one of the attorneys for Citizens Gas, was advised that the City would not accept an assignment of the lease between Indianapolis Gas and Citizens Gas. On September 9, 1935, Citizens Gas tendered to the City four instruments of conveyance:

1. Deed of conveyance of real estate. (P X Stip. 55, III R. 833, offered II R. 327.)

2. Assignment of a lease of office space in the Majestic Building wherein Citizens Gas maintained offices. (P X Stip. 56, III R. 835, offered II R. 327.)

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[10] 206 Ind. 448, 450. The *Williams* case is relied upon by Chase as *res adjudicata*. (I R. 14.) (Br. pp. 74-90. A full discussion of the *Williams* case appears in the argument in this brief.

3. A conveyance of the personal property owned by Citizens Gas. (Ex. E to complaint, I R. 122, 126, offered II R. 327.)

4. An instrument purporting to assign the ninety-nine year lease between Indianapolis Gas, Lessor, and Citizens Gas, Lessee. (Exhibit F to complaint, I R. 127, 129, offered II R. 327.)

At the time of the delivery of the four instruments to a representative of the City (II R. 467), there was delivered to Mr. Sparks, as the attorney for Citizens Gas, a rejection of the ninety-nine year lease signed by Mr. Dithmer as President of the Board of Directors, for the Department of Utilities, together with a certified copy of a resolution of the Board of Directors rejecting the lease. (II R. 468.)[11] Also on September 9, 1935, the rejection of the lease was served on William J. Yule, Secretary of Indianapolis Gas, together with a copy of the resolution of the Board of Directors rejecting the assignment of the lease, and a resolution for the temporary use of the property of Indianapolis Gas. (II R. 423, 463; III R. 965.)

There was at the same time served on Mr. Sparks a resolution for the temporary use of the property of Indianapolis Gas which was adopted by the Board of Directors on September 9, 1935. (Exhibit C to City's answer and counterclaim. I R. 200-204.)

The action of the Board of Directors rejecting the lease was ratified by an ordinance of the common council of the City. (III R. 1017, 1018, offered II R. 429.)

On March 2, 1936, a letter from the Department of Utilities signed by the president of the Board of Directors and accepted by Indianapolis Gas, extended the temporary use agreement of September 9, 1935. (I R. 205, 206, 207.)

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[11] The resolution for rejection of the lease is Exhibit G to the bill of complaint and has, as a part thereof, the rejection handed to Citizens Gas. (I R. 130.) The tendered assignment of the lease was recorded at the instance of Citizens Gas. (III R. 1041, offered II R. 432.)

The March 2, 1936, agreement provided that the City would pay into escrow a sum of money equal to the semi-annual instalment of interest due on Indianapolis Gas bonds and charges of the trustee for disbursements. Also that all Federal income taxes on money paid by Citizens Gas to Indianapolis Gas in 1935 and the State Gross Income Tax due in April 1936 would be paid by the City.

During the life of the agreement the City agreed to deposit in escrow, and has so deposited, a sum of money equal to each semi-annual instalment of interest on Indianapolis Gas bonds and dividends on its stock.

The agreement then provided:

> "It is understood that the payments referred to, including the deposits made with the escrow, *are made without prejudice to our position or rights and that we may continue to operate the plant and equipment covered by said lease of September 30, 1913, until the present controversy is adjusted or finally terminated by a decree of Court, without such operation or such payments or the execution of this agreement constituting an admission on our part that said lease of September 30, 1913, is valid or binding on the City of Indianapolis or said Department of Utilities of said City of Indianapolis, or any of its or their property.*" (Our emphasis.) (I R. 207.)

At a meeting held on March 11, 1936, Chase was advised that the agreement of March 2, 1936, had been made between the Indianapolis Gas and the City. (III R. 992, offered II R. 426.) To December 31, 1938, the City had deposited $1,217,875 in the escrow fund for the benefit of the bondholders and stockholders of Indianapolis Gas if the lease should be held valid. (City's X 10, III R. 1020, 1031, offered II R. 430.)

On June 8, 1936, Chase as Trustee under a mortgage to secure bonds executed by Indianapolis Gas (I R. 4), filed its complaint in the United States District Court for the Southern District of Indiana, Indianapolis Division. The main relief asked for by Chase was a request by it for a

declaration that the ninety-nine year lease (I R. 5, 6, 21) executed by Indianapolis Gas, Lessor, to Citizens Gas, Lessee, on September 30, 1913 (I R. 5) was binding upon and enforceable against the City as successor trustee of a public charitable trust (I R. 20, 21, 22) as a claimed assignee of the lease. (I R. 16, 17.) The bill does not allege that the lease is valid, but seeks a declaration of the binding effect on the City of such lease on the grounds of laches (I R. 12), of estoppel (I R. 18, 19) and *res adjudicata.* (I R. 8, 9, 10 and 11.)

Chase also sought to obtain an injunction requiring the City to make the payments and perform the covenants contained in the lease (I R. 21, 306); that Indianapolis Gas be enjoined from doing anything to impair or rescind the lease (I R. 21); that the City be made to pay direct to Chase or Clerk of the Court all interest payments as they become due (I R. 21); that a judgment be entered for all unpaid interest and interest on interest (I R. 21); that reasonable expenses and attorney's fees of Chase be determined and judgment given therefor. (I R. 21, 22.) By amendment to its bill Chase asked that the standby agreement of March 2, 1936 (I R. 295, 261, offered II R. 327), between the City and Indianapolis Gas be held not binding on Chase and that the escrowed fund, or so much as represents unpaid interest with interest on interest, is the property of the Indianapolis Gas bondholders. (I R. 260.) By a second amendment and supplement (II R. 296-306) Chase asked judgment for all unpaid interest, damages and expenses resulting from the alleged failure to make replacements (II R. 301); for all rents, issues and profits from September 9, 1935; that Indianapolis Gas and Citizens Gas apply to all payments of any judgments entered against them all property, debts, equitable rights, etc. which either had (II R. 302-306); that the order of liability among the defendants be determined and that Indianapolis Gas and Citizens Gas be enjoined from selling Indianapolis Gas bonds which each held. (II R. 306.)

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The United States Circuit Court of Appeals for the Seventh Circuit erred in each of the following particulars:

1. In holding that defendant Indianapolis Gas should not be realigned as a party plaintiff with Chase for the reason that Chase and Indianapolis Gas were in accord on the principal controversy, against the City, although Chase and Indianapolis Gas (but not the City) were adverse in attitude on subsidiary and dependent issues.

2. In holding that the attitude of the parties on subsidiary and dependent issues prevents their realignment on the major and substantial issue, in order to test the jurisdiction of the court.

3. In directing the entry of a judgment against the City, when the City had not had its day in court on the question of the burdensome character of the lease of September 30, 1913. This was a denial of due process of law in violation of the Fifth Amendment and the Fourteenth Amendment and each of them to the Constitution of the United States.

The requirements of due process are not satisfied unless a party has the right in a trial court to a determination of all issues of fact and law. This requirement has been denied the City.

4. In refusing to follow the rule announced by this Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that the Circuit Court of Appeals refused to follow the controlling Indiana decisions on (a) the question of estoppel of a municipal corporation, (b) the doctrine of *res adjudicata*, (c) the question of the denial of all powers granted by a municipal corporation except those expressly granted and (d) the question of the violation of Sections 85 and 254

of the acts of the Indiana General Assembly of 1905 prohibiting the execution of any such lease as that here involved for a longer period than 25 years and even for such a period without proper municipal sanction.

5. In holding a municipal corporation liable for 77 years for future payments of more than $45,000,000 under a lease solely because of the implied power of the initial trustee to execute the same although the Indiana law is that all powers granted by a municipal corporation must be strictly construed against the grantee and nothing passes by implication. When the lease was originally executed, the City was not a party to it, did not sign or execute it, is not named as a party obligated, is not an assignee although an assignment was tendered, but was rejected, and no municipal authority has ever affirmed, ratified or approved the lease. Therefore the lease is invalid and unenforceable against the City.

SUMMARY OF ARGUMENT.

I.

REALIGNMENT TO DETERMINE JURISDICTION.

Indianapolis Gas should have been realigned as a party plaintiff with Chase for the reason that Chase and Indianapolis Gas were in accord on the principal controversy against the City although Chase and Indianapolis Gas (but not the City) were adverse in attitude on subsidiary and dependent issues.

The Circuit Court of Appeals also erred in holding that before such realignment may be required, the parties must be in substantial accord upon all issues presented, and that it is not sufficient that they merely be in accord upon the main issue or some of the issues.

In its opinion of June 6, 1940, as modified, the Circuit Court of Appeals held for the first time that Chase was entitled to a coercive judgment enforceable in the following order:

> (1) Against the City as successor trustee and the trust property; (2) against Citizens Gas; (3) against Indianapolis Gas.

Under the judgment ordered entered, the City will be required to, and the evidence shows that the City is abundantly able to, pay the entire judgment. Indianapolis Gas will therefore be wholly insulated from any liability.

The result of the decision of the Circuit Court of Appeals is that a judgment has been ordered entered which is equally beneficial to Chase and to Indianapolis Gas and which amounts in substance not to a judgment against Indianapolis Gas but one in its favor. The actual position taken on the record by the parties is:

Chase asserts that the lease is binding against the City. Indianapolis Gas likewise asserts the lease is binding against the City. The City denies the lease is enforceable against it.

The attitude of the respective parties toward the actual and substantial controversy should determine whether realignment shall take place for the purpose of testing the jurisdiction of the Court, irrespective of the attitude of the parties toward subsidiary and minor issues.

The arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist. (Br. p. 22.)

II.

DUE PROCESS OF LAW.

The Circuit Court of Appeals erred in directing the entry of a judgment against the City when the City had not had its day in court on the question of the burdensome character of the lease of September 30, 1913. This was a denial to the City of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

In its counterclaim the City alleged that the lease was burdensome upon the City and the property of the public charitable trust, and for that reason was a lease which the initial trustee had no power to make, especially in view of the fact that there was a definitely fixed date for the termination of its trusteeship.

The City alleged that among the burdensome provisions of the lease were the following:

(a) The payment of annual rent in a sum largely exceeding a fair return on the fair value of the property of Indianapolis Gas;

(b) The requirement of the lease that the lessee should, during the entire term of the lease, refinance the bond issue of Indianapolis Gas in the principal amount of $6,881,000, and that if the bonds were to sell below par, to pay the difference to Indianapolis Gas;

(c) A requirement in the lease penalizing the lessee in the event that it reduce the price of gas. The agreement provided for the increase in the annual rent of $10,000 a

year when gas was sold at more than 45¢ and less than 50¢ a thousand cubic feet, and an additional increase of $5,000 a year when gas was sold at 45¢ or less per thousand cubic feet. (I R. 186.)

Chase after having unsuccessfully moved to strike out the averments of burdensomeness, then denied them. (I R. 214.) The issue of the burdensome character of the lease was tendered by the City and denied by Chase, and thus was presented for determination.

The District Court entered an order reserving the burdensome character of the lease for future trial, and at the time the order was entered there was no objection or exception made or taken by any party. The Circuit Court of Appeals, among other things, decided that "in making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who, in addition, may have such lease set aside * * *."

The court also decided, among other things, that the ninety-nine year lease is valid; that the lease binds the City as successor trustee and the trust property; that the leasehold interest is a part of the trust res, and that the City has accepted the trust res.

It is clear from the opinion of the Circuit Court of Appeals that the issue of burdensomeness on which the City has had no opportunity to be heard either on the question of fact or law, and which was expressly reserved by the trial court for future determination, was decided against the City by the Circuit Court of Appeals.

Whether the cases relied upon by Chase were *res adjudicata* of the burdensomeness of the lease was under the Indiana decisions a question of fact,[12] and the City was entitled to a trial and findings by the District Court upon which the District Court's decision could be reviewed. No

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[12] There are decisions in other jurisdictions which hold that the question of *res adjudicata* is a mixed question of law and fact.

hearing was had on the issue of burdensomeness, and no findings were made by the District Court.

In the instant case the requirements of due process are satisfied only by a notice, an opportunity to be heard and a hearing in the trial court on every question of law and fact including the reserved issue of burdensomeness.

If the power exists in the Circuit Court of Appeals to deny to the City due process of law, as it has done, then the judicial department of the Government, which sits to uphold the Constitution, is the only department possessing the power to deny a hearing to litigants. If such authority exists in the courts, then in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent. Judicial proceedings cannot be valid unless they proceed upon inquiry and render judgment only after trial. In the instant case there was no inquiry. There was no trial on the reserved issue of burdensomeness.

A hearing in the trial court is a matter of right. The hearing guaranteed by the due process clause cannot be in an appellate tribunal. (Br. p. 32.)

III.

LEASE UNENFORCEABLE AGAINST THE CITY.

The facts of this case lend no support to any of Chase's contentions that the City is bound by the terms of the lease. The City is not a party to the lease; it did not sign nor execute it; it is not named as a party obligated; it was not an assignee of the lease, an assignment having been tendered and rejected; and no competent authority having the right to deal with the subject-matter ever authorized its execution, agreed to it, affirmed it or ratified it.

The lease in question here was executed in violation of Sections 85 and 254 of Chapter 129 of the Acts of the

General Assembly of Indiana, 1905. These Sections expressly limit the making of such a contract for the furnishing to a City or its inhabitants heat or light for a term longer than twenty-five years.

These same statutes also require that any contract for heat and light shall be first agreed to by the Board of Public Works and thereafter there must be an ordinance of the Common Council approving it and affirming it. The lease in question here is for a term of ninety-nine years and it was neither agreed to by the Board of Public Works nor approved nor affirmed by an ordinance of the Common Council.

These two sections of the Indiana statutes indicate and define the public policy of the State to be against such contracts, such as is the lease in question here. Such contracts in violation of the public policy of the State are void and cannot be ratified.

There was neither express nor implied power in the initial trustee to execute a lease which would be binding upon the successor trustee.

The Circuit Court of Appeals held that the City was liable for 77 years for future payments aggregating more than $45,000,000 under a lease solely because of the implied power of the initial trustee to execute the same.

When the lease was originally executed, the City was not a party to it; did not sign or execute it; is not named as a party obligated; is not an assignee although an assignment was tendered but was rejected; and there was no municipal authority affirming, ratifying or approving the lease. The rejection of the lease by the Department of Utilities was ratified by an ordinance of the Common Council of the City. (III R. 1017, offered II R. 429.) The lease is clearly invalid and unenforceable against the City.

The Circuit Court of Appeals said:

> "The power to execute this 99 years lease was authorized by the Commission in 1913." (113 F. 2d 217, 221, IV R. 1285.)

The Public Service Commission, to which the Court refers, had no power to determine the validity of the lease and could bind no one on that proposition.

The Circuit Court of Appeals also held that (p. 227) (IV R. 1297):

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remain silent on the subject of trustee's powers. The only applicable language relates to duties and not to powers."

Thus if the terms of the trust remain silent on the trustee's powers, as is the fact, the power to make the lease cannot be implied. This is true because this Court has so held and the Indiana Supreme Court has so held. Both courts have said that grants of rights and privileges by a state or a municipality are strictly construed, and whatever is not unequivocally granted, is withheld; nothing is taken by implication against the public except what necessarily flows from the nature of the terms of the grant.

The trust instruments contain detailed instructions respecting many matters of lesser importance than the power to make this lease, such as the retirement of stock; the power to purchase Consumers Gas Trust mains; the laying of pipes; the materials to be used; the quality of the gas; the refilling of excavations; and provided in detail the order in which the earnings should be used and the duties of the officers. (I R. 84-103.) It was also provided that any member of the board of trustees could be removed upon a showing that he was an employee of any company organized for the purpose of manufacturing or delivering gas to consumers in Indianapolis, or that he held any securities or capital stock of such company.

Trustees such as was Citizens Gas, are required to act with great fidelity toward those who are the beneficiaries of the trust.

To assume implied power is inconsistent with the obligations of Citizens Gas under its contract with the City.

IV.

RULE OF ERIE RAILROAD v. TOMPKINS.

The Circuit Court of Appeals has erred in refusing to follow the rule announced by this Court in *Erie Railroad v. Tompkins*, in the following particulars:

1. In refusing to follow the Indiana decisions which hold

(a) That the doctrine of estoppel has no application where the other party was not influenced by the acts pleaded as an estoppel.

There is no proof in the record that any present bondholder of Indianapolis Gas bonds (of which bonds Chase is Trustee) knew of, relied on, or was influenced by any acts of the City.

(b) An estoppel against a municipal corporation cannot be founded upon acts done by municipal officers in excess of their authority.

2. In refusing to follow the Indiana decisions on the question of *res adjudicata* which announced the Indiana rule to be that the doctrine of former adjudication may not be invoked by any party unless he has tendered to the party against whom the doctrine is invoked, an issue to which the latter could have demurred or pleaded. It must also appear that the thing demanded was the same. It must also appear that the cause of action is between the same parties and found for one of them in the same quality and, where, as here, the causes of action are different it must appear that the question was actually litigated between the parties. The benefit derived from a verdict or decision must be mutual.

ARGUMENT.

I.

JURISDICTION.

The first question presented is one of Federal jurisdiction. Jurisdiction is asserted by Chase to exist on the sole ground of diversity of citizenship.

This suit was brought by Chase as mortgagee i.e. trustee under a deed of trust securing an issue of bonds of Indianapolis Gas, one of the defendants below. Chase sought a decree declaring that the ninety-nine year lease between Indianapolis Gas, lessor, and Citizens Gas, lessee, was binding upon and enforceable against the City and the individual members of the Boards of Trustees and Directors for Utilities on the grounds of alleged laches, estoppel and *res adjudicata* and as a claimed assignee of Citizens Gas. The bill asked a temporary injunction requiring the City to make the payments and perform the covenants contained in the lease, and also sought a judgment for amounts alleged to be unpaid under the lease; that certain escrowed money be declared the property of the bondholders; a judgment for damages and that all rents and profits from September 9, 1935 be given Chase.

The City answered that Indianapolis Gas was an indispensable party to the controversy, and should be aligned in interest with Chase; an alignment which would destroy the diversity of citizenship and require dismissal of the bill.[13]

It is clear that if Indianapolis Gas were not a party to this litigation, it would be free to relitigate against the City and the other parties the questions involved here. The

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[13] A hearing was had pursuant to the request of the City under Equity Rule No. 29. The District Court dismissed the bill for want of jurisdiction. The majority opinion of the Circuit Court of Appeals reversed the District Court and certiorari was denied. 305 U. S. 606.

Circuit Court of Appeals held, and correctly, that Indianapolis Gas was an indispensable party.

Chase National Bank vs. Citizens Gas Company, 96 F. 2d, 363.

The real and controlling controversy in this case is whether the pleaded lease has become enforceable against the City. No other cause of action is alleged against the City except claims for damages which are dependent upon the determination of the validity of the lease. By taking the most favorable view to Chase of its complaint as amended and supplemented, the subsidiary controversies between it and Indianapolis Gas, which Chase claims to exist, are as follows:

Chase asks an injunction to preserve and protect the property (I R. 4); that the lease be declared the property of Chase and part of the security for the performance of the obligations of Indianapolis Gas under the mortgage; that Indianapolis Gas be enjoined from making any contract or agreement or doing any act which will impair, rescind, or modify the lease to Citizens Gas or to alter the obligations of the lessee thereunder. (I R. 21.)

By its amendment and supplement Chase asked that the agreement between the City and Indianapolis Gas, dated March 2, 1936, whereby the City agreed to temporarily operate the property of Indianapolis Gas and to pay therefor a sum equal to the rental payments agreed to be paid by Citizens Gas but without prejudice to the City's rights to claim that the lease was invalid, did not bind Chase (I R. 259); that the fund deposited with the Indiana National Bank in escrow under the agreement of March 2, 1936, or that part thereof that represented the interest payable under the deed of trust, together with interest on interest, be declared the property of the bondholders of Indianapolis Gas. (I R. 260.)

By its second amendment and supplement to its bill, Chase asked that the Indianapolis Gas bonds in the amount

of $120,000 held by Indianapolis Gas, should not be permitted to participate in any distribution of funds recovered in the case until all other bondholders were paid in full and all claims of Chase paid, satisfied and discharged; that Indianapolis Gas and the other defendants are liable to Chase for all losses, damages, costs, charges and expenses resulting from the alleged failure to make renewals, repairs, replacements and extensions necessary to keep the leased premises in good order and repair (II R. 300); that the Court give judgment to Chase against Indianapolis Gas and the other defendants for all the unpaid interest, together with interest thereon (I R. 391); that Indianapolis Gas apply to the payment of any and all judgments entered against it in this cause all of its property, debts, choses in action, and equitable interests which belong to it or held in trust for it, which property was to include, but not be limited to, the $120,000 Indianapolis Gas bonds; any rights of Indianapolis Gas under the lease; any rights of Indianapolis Gas growing out of the transfer of all the property of Citizens Gas to the City; all the rights of Indianapolis Gas growing out of a certain indemnity agreement (Exhibit J to second amendment and supplement II R. 306) between the City and Citizens Gas; any rights of Indianapolis Gas growing out of use of its property by the City; and any right of Indianapolis Gas to the rents, proceeds, etc. from the leased property. (II R. 302, 303.) Chase also asked that Indianapolis Gas and the City be enjoined from selling or in any way disposing of or encumbering the Indianapolis Gas bonds held by each of them.

In respect of the main controversy, the parties by the record contend as follows:

Citizens Gas says in its answer (I R. 230) that whether or not the City is subject to the lease, it has fully and completely carried out its duties and obligations. (I R. 221, 222.)

City contends that the lease is invalid and unenforceable against it. (I R. 141-208, 209-212, 266-269.)

Chase maintains that the lease is valid and binding against the City. (I R. 3, 20-21.)

Indianapolis Gas maintains that the lease is valid and binding against the City. (I R. 137, 138, 215, 219.)

Chase and Indianapolis Gas have a similar and identical interest against the City on the question of the validity of the lease.

Chase says (br. p. 40):

> "The plaintiff has a bona fide claim for unpaid interest against Indianapolis Gas, Citizens Gas and the City * * *."

If the lease is invalid, it has no such claim against the City. If the lease is valid, Indianapolis Gas would have a claim against the City under the lease and could have such claim satisfied out of the escrowed fund.[11]

It is of interest to both Chase and Indianapolis Gas that the lease be declared binding and enforceable against the City. It is against the interest of each that such lease be declared invalid and unenforceable against the City.

The Circuit Court of Appeals held in its majority opinion that Indianapolis Gas was an indispensable party to the controversy. (II R. 288.) The Court then said:

> "The rule seems to be that before such realignment may be required, the parties must be in substantial accord upon *all issues* presented * * *. It is not sufficient that they merely be in accord upon one issue or some of the issues." (Our emphasis.) (II R. 291.)
>
> *Chase National Bank, etc., et al. vs. Citizens Gas et al.*, 96 F. 2d 363, 366, 367, certiorari denied 305 U. S. 600.

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[11] An amount equal to the interest on the bonds, the dividends on the stock, and an amount equal to other payments to be made under the lease have been deposited in escrow, and on December 31, 1938, there was in such escrowed fund $1,217,875. (III R. 1020-1023; offered II R. 430.) Each month subsequent to December 31, 1938, amounts equal to 1/12 of the annual sum agreed to be paid by Citizens Gas under the lease have been accrued in the escrowed fund. (II R. 473, 474.)

For the first time the Circuit Court of Appeals in its opinion of June 6, 1940, as modified, held that Chase was entitled to a coercive judgment enforceable in the following order: (1) Against the City as successor trustee and the trust property; (2) against Citizens Gas; (3) against Indianapolis Gas. As pointed out in Foot Note 14, sums of money equal to the amounts charged as rental under the terms of the lease have been put in escrow pursuant to agreement. (I R. 205, 207, II R. 473, 474.) From the escrowed fund, together with funds arising from the operation of the property (II R. 542, 543), the City will be required to and is abundantly able to pay the entire judgment, and Indianapolis Gas will be wholly insulated from any liability.

The result of the decision of the Circuit Court of Appeals is that a judgment has been ordered entered which is equally beneficial to Chase and to Indianapolis Gas, and which amounts in substance *not to a judgment against Indianapolis Gas, but one in its favor.*

Where federal jurisdiction is wholly dependent upon diversity of citizenship, it is the duty of the court to align the parties in accordance with their interests regardless of whether they are named as plaintiffs or defendants.

In reality there is no pretense of seeking final relief against Indianapolis Gas alone in this case. Subdivision 4 (I R. 21) of the prayer of plaintiff's bill does ask that pending the hearing and final judgment, Indianapolis Gas be restrained from entering into any contract or doing any other act to rescind or modify the lease of September 30, 1913. Chase has not attempted to procure any preliminary injunction against Indianapolis Gas, and apparently is satisfied that no danger exists that Indianapolis Gas will attempt to affect any rights which it may have in the premises.

Other subsidiary relief asked by Chase against Indianapolis Gas is either dependent upon the decision of the main question, viz: the enforceability of the 99 year lease against

the City, or is such relief that by reason of the agreement of March 2, 1936, between the City and Indianapolis Gas, and by reason of the fund now held in escrow, Indianapolis Gas being third in order of liability will not be called upon to respond.

Looking at the judgment which the Circuit Court of Appeals has ordered entered (IV R. 1306), we see that the City is named as first in liability. It is not necessary to inquire if the taxing power of the City is available to pay the judgment ordered entered because the escrowed fund and the revenues of the City from the operation of the plant are available and sufficient to discharge the judgment.

The Circuit Court of Appeals has not restricted the judgment which it has ordered entered so that it may be contended that the coercive judgment is payable out of the general revenues of the City.[15] After the opinion was filed on June 6, 1940, by the Circuit Court of Appeals, the petitioners, in their petition for rehearing, pointed out to the Court that it had erred "in directing that a coercive judgment, presumably payable out of the general revenues of the City, be entered in favor of Chase, thus requiring municipal revenues raised by taxation to be applied, if necessary, in payment of rentals under a lease which had no municipal sanction and which was executed in direct violation of applicable Indiana statutes." It was also pointed out that there was no limitation in the opinion that the unpaid coupons and the interest on them, as well as the interest on the judgment, should be collectible only out of the revenues arising from the operation of the Indianapolis Gas property. (IV R. 1312.) On July 19, 1940, an amendment to the original opinion of the Circuit Court of Appeals was filed by it. (IV R. 1335.) A petition for rehearing was addressed to the opinion as amended, and again petitioners pointed out to the Court that it had erred in directing that a coercive

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[15] Clause 29 of the lease (I R. 78) provides that the parties will look solely to the corporate assets and franchises of the other for the carrying out of the obligations of the lease.

judgment presumably payable out of the general revenues of the City be entered in favor of Chase. (IV R. 1350.) No further change was made in the opinion.

With the money in the escrowed fund and the revenues from operation available all to be levied on first, it is crystal clear that Indianapolis Gas being third in order of liability, is more thoroughly insulated against execution than ever before. The Circuit Court of Appeals' opinion shows clearly that Chase and Indianapolis Gas have interests which are identical in respect of the validity of the lease, which is the main controversy.

If Indianapolis Gas be realigned according to its real interest in the dispute involved in this controversy, it is inevitably realigned with Chase. This is true because the City has now been held to be bound by the lease and required to pay the obligations of Indianapolis Gas under the mortgage. No matter what the form of the judgment may be, no one can realistically suppose that Indianapolis Gas has been harmed by the entry of this judgment or that it will be required to pay a single penny as a result of it. On the contrary, it will have obtained as a result of the decision of the Circuit Court of Appeals exactly what it sought from the commencement of this litigation: a decree requiring the City to make the payments under the lease, and as a practical proposition, exempting it from all the responsibility to Chase. The result is that Chase and Indianapolis Gas together, have maintained an action in the Federal Court where Indianapolis Gas is an indispensable party, and where the interest of Chase and Indianapolis Gas on the main controversy is a joint one.

The other subsidiary relief asked against Indianapolis Gas by Chase has either not been prosecuted beyond the allegation in the complaint and prayers, is dependent upon a decision respecting the validity of the lease, or is relief against which Indianapolis Gas is completely insulated.

The one reported decision that appears directly to involve and discuss the principle of realignment where the

parties have identical interests on the principal controversy, is *Sutton v. English*, 246 U. S. 199-204, 62 L. ed. 664. The bill of complaint in that case alleged that Moses and Mary Jane Hubbard had executed a joint will purporting to dispose of certain community property after it became the separate property of Mary Jane Hubbard; that Moses Hubbard was then insane; that certain of the defendants had procured a decree of a Texas court that a trust created under that will was valid; that Mary Jane Hubbard had purported to make a separate will disposing of the residue of her separate property to defendant Cora D. Spencer; that Mary Jane Hubbard was then insane; and the bill prayed for this relief: (1) That the joint will be declared invalid; (2) that the judgment of the Texas court with respect to said will be set aside; (3) that the will of Mary Jane Hubbard be annulled, at least with respect to Cora D. Spencer; and (4) that the community property, having thus been established to be the separate estate of Mary Jane Hubbard, and not devised by her, be partitioned among her heirs at law. Plaintiffs were all of the heirs at law of Mary Jane Hubbard except Cora D. Spencer; and though she was an heir at law of Mary Jane Hubbard, she was made a party defendant. All plaintiffs were nonresidents of Texas; and all defendants were residents of Texas. If defendant Cora D. Spencer had been made a party plaintiff, then all of the heirs at law of Mary Jane Hubbard would have been plaintiffs, but diversity of citizenship would have been destroyed. The lower court held that defendant Cora D. Spencer was united in interest with and should be aligned with plaintiffs because she was an heir at law as they were. This Court, however, Mr. Justice Pitney delivering the opinion, held that while Cora D. Spencer was interested equally with plaintiffs in the partition of the Mary Jane Hubbard property, yet such interest did not control the alignment, because before there could be any partition, there would have to be a determination that the devise to Cora D. Spencer was invalid and that the

joint will did not pass any property, and in that substantial issue, which had to be decided first, she was adversely interested to plaintiffs. The Court said (p. 204):

> "Upon this statement, it will be apparent that the court below erred in holding, as it did, that the defendant Cora D. Spencer should be treated as one of the plaintiffs and aligned with them for the purpose of determining the question of diversity of citizenship. Provided plaintiffs attained their first three objects, her interest would be the same as theirs with respect to the prayer for partition; but before this result could be reached plaintiffs must prevail as to their third object, and with respect to this her interest was altogether adverse to theirs. Therefore she was properly made a party defendant, that being her attitude towards the actual and substantial controversy."

(The bill was ultimately dismissed for want of jurisdiction on the ground that it involved a probate matter).

In the *Sutton* case the attitude of the parties toward what this Court characterized as the actual and substantial controversy determined whether there should be realignment irrespective of the attitude of the parties toward the subsidiary and dependent controversies averred in the bill.

Had the Circuit Court of Appeals followed the rule in *Sutton v. English*, it would have declared that Indianapolis Gas and Chase had an identity of interest on the main controversy respecting the enforceability of the 99 year lease against the City, and that Indianapolis Gas, being an indispensable party, and despite the existence of subsidiary and dependent controversies, should be realigned with Chase. Diversity of citizenship would thereby have been destroyed and the District Court would have had no jurisdiction.

Judge Treanor in the first appeal of this case, in a dissenting opinion (96 F. (2d) 368), pointed out that:

> "In my opinion the only substantial, and the dominating question, presented in this suit is whether the

lease is a valid and enforcible obligation against the city of Indianapolis. And as respects that question the interests of the plaintiff, as trustees of owners of bonds of the Indianapolis Gas Company, and the Indianapolis Gas Company are identical. I find nothing in the agreement of March 2, 1936, between the city and the Indianapolis Gas Company to create an adversity of interest between the plaintiff and the Indianapolis Gas Company. The terms of that agreement provided for payments by the city pending a determination of the controversy between the city and the Indianapolis Gas Company as to the enforceability of the lease against the city, and expressly provides against prejudice to the rights of the Indianapolis Gas Company respecting the lease; and in general had as its objective to safeguard against any interruption in the gas utility service and to insure the ultimate payment to the Indianapolis Gas Company of all amounts due under the lease in case the lease finally should be determined to be valid and enforceable against the city."

Perhaps no stronger evidence appears in this record of the complete unanimity of interest of Indianapolis Gas and Chase than the fact that Indianapolis Gas opposed the granting of petitioners' writs and filed a brief in opposition. Presumably Indianapolis Gas will oppose the City in seeking a reversal of the Circuit Court of Appeals.

If the interests of Chase and Indianapolis Gas were not in accord, it is difficult to understand why Indianapolis Gas wished to oppose the review by this Court of a judgment allegedly against it for more than $1,000,000 or why it would seek, if it does, to have that judgment affirmed.

After the Circuit Court of Appeals had filed its opinion of June 6, 1940, as modified, the City urged in its petition for a rehearing that Indianapolis Gas should be realigned with Chase. (IV R. 1311; IV R. 1347-1349.) Realignment of Indianapolis Gas with Chase was also urged by the City in its brief in support of its petition for rehearing before the Circuit Court of Appeals. (IV R. 1377-1381.)

Viewing the case in its entirety, we see that Chase was not mistaken when it made Indianapolis Gas a party to the suit. But making Indianapolis Gas a party defendant was not insurance that the District Court thereby acquired jurisdiction on the ground of diversity of citizenship; the sole ground on which jurisdiction was asserted by Chase to exist. By arranging the parties according to their real interest in the case, viz.: the enforceability of the 99 year lease against the City, it is clear that the interest of Indianapolis Gas is identical with the interest of Chase. Indianapolis Gas and Chase thus should be realigned as parties plaintiff. Diversity of citizenship would thus be destroyed, and the sole ground of jurisdiction of the Federal District Court would thereby be lost: Compare *City of Dawson vs. Columbia, etc. Trust Co.*, 197 U. S. 178, 181, 49 L. ed. 713, 716; *Niles-Bement-Pond Company vs. Iron Moulders Union*, 254 U. S. 77, 81, 65 L. ed. 145, 148.

II.

DUE PROCESS OF LAW.

As we shall hereafter show, (*infra* p. 43) the lease was unenforceable against the City irrespective of whether it was of a burdensome character. But in no event could the initial trustee of a public charitable trust have power or authority to execute a burdensome 99 year lease.

The Circuit Court of Appeals erred in directing the entry of a judgment against the City when the City had not had its day in court on the question of the burdensome character of the lease of September 30, 1913. This was a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

In its counterclaim the City alleged that the lease was burdensome upon the City and the property of the public charitable trust, and for that reason was a lease which the initial trustee had no power to make. The City alleged that among the burdensome provisions of the lease there were the following:

(a) The payment of annual rent in a sum largely exceeding a fair return on the fair value of the property of Indianapolis Gas;

(b) The requirement of the lease that the lessee should, during the entire term of the lease, refinance the bond issue of Indianapolis Gas in the principal amount of $6,881,000, and that if the bonds were to sell below par, to pay the difference to Indianapolis Gas;

(c) A requirement in the lease penalizing the lessee in the event that it reduce the price of gas. The agreement provided for the increase in the annual rent of $10,000 a year when gas was sold at more than 45c and less than 50c a thousand cubic feet, and an additional increase of $5,000 a year when gas was sold at 45c or less per thousand cubic feet. (I R. 186.)

Chase after unsuccessfully moving to strike these allegations of burdensomeness, then denied them. (I R. 214.) Thus the issue of the burdensome character of the lease was tendered by the City and denied by Chase, and thus was presented for determination.

While Chase initially contended that the burdensomeness of the lease was no defense and sought to have stricken from the answer and counterclaim of the City the allegations respecting the burdensomeness of the lease (II R. 317-319), ultimately when the order reserving the issue of burdensomeness for future trial was made, there was no objection or exception made to the reservation by any party. (II R. 321, 322.)

At a pre-trial conference on the 14th day of January, 1939 (IV R. 1320) counsel for the City presented a proposed form of order respecting the trial of certain issues. On January 16, 1939, counsel for Chase wrote a letter to the Honorable Robert C. Baltzell, Judge of the United States District Court, enclosing a proposed form of order directing a separate trial of certain claims and

causes of action. (IV R. 1320.) In the letter counsel for Chase said that:

> "With respect to the burdensomeness of the lease, we have in large part adopted Mr. Thompson's language in his form of order as presented on Saturday."

On January 18, 1939, the District Court, without objection or exception by any party, entered an order reserving the issue of the burdensome character of the lease for future trial. The relevant portions of the order provide:

> "It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis, or any of the property acquired by it from the Citizens Gas Company of Indianapolis, on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property viz., that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust; reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.
>
> The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any or all issues to a Master." (II R. 321, 322.)

The District Court, in its memorandum opinion, pointed out that only a part of the issues had been tried. It said:

> "Under the issues presented at this time for determination, the plaintiff is entitled to no money judgment against the City." (III R. 1159.)

The District Court's conclusion of law Number 10 recited

> "that the plaintiff should take nothing in this action as against the defendant City of Indianapolis under the issues presented at this time for determination." (III R. 1192.)

Counsel for Chase understood that certain issues were reserved. At the time of resting his case, Chase's counsel said:

> "Of course there are other issues to be reserved for later trial." (II R. 475.)

The Circuit Court of Appeals, in its opinion as modified, held that:

> "In making a long-term lease, a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who, in addition, may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that Court did not find the lease in question unreasonable as to time or as to its other terms. *Williams vs. Citizens Gas, et al.*, 206 Ind. 448, 458, 460." (III R. 1300.)

The Circuit Court of Appeals also decided that:

> "Our conclusions in this case follow: (1) The ninety-nine years lease is valid; (2) the assignment of the lease did not relieve Citizens Gas from its obligations as lessee; (3) the indemnity contract is effective; (4) the lease binds the City as successor trustee and the

trust property; (5) the leasehold interest is part of the trust res; (6) the City has accepted the trust res; (7) Chase has a right to interest; (8) Chase has a right to interest on interest; and (9) Chase is entitled to interest at the rate of 5%." (III R. 1306.)

It is clear that the Circuit Court of Appeals decided the reserved issue of burdensomeness.

The City had the right to rely on the reservation of the issue of burdensomeness and to believe it would be heard on that issue, both on questions of law and fact, before judgment. The City was not bound to take in advance the precaution of putting in its evidence on this reserved issue; indeed it would have had no right to do so because of the reservation.

In *Saunders vs. Shaw, et al.*, 244 U. S. 317, 320, 61 L. ed. 1163, 1165, it was pointed out that the record did not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted the writ of error. It was held that ordinarily such assertion of claim of right would not be enough.

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance."

In the cases at bar the issue of the burdensome character of the lease was expressly reserved and no evidence was introduced by the City or by anyone else on such issue. (II R. 321, 322.)

The City was not bound to contemplate a decision by the Circuit Court of Appeals of the reserved issue of burdensomeness before its evidence was heard. It is clear

under the decisions of this Court that the City is entitled to be heard on the questions of both law and fact on the reserved issue of burdensomeness before a decision is rendered against it.

Due process of law means notice and an opportunity to be heard, and requires that a hearing be given to a party before conclusive effect is given to a prior judgment.

In *Hovey v. Elliott*, 167 U. S. 409, 417, 418, 42 L. ed. 215, 221, it was said:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

In *Ohio Bell Telephone Co. v. Public Utilities Com.*, 301 U. S. 292, 304-306, 81 L. ed. 1093, 1102, it was said:

> "The right to such a hearing is one of 'the rudiments of fair play' * * * assured to every litigant by the Fourteenth Amendment as a minimal requirement. * * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In *Ohio Water Works v. Ben Avon Borough*, 253 U. S. 287, 289, 64 L. ed. 908, 914, this Court had before it the com-

plaint of the Water Company that it was denied the right to a hearing.

Mr. Justice McReynolds, speaking for the Court, said that:

> "In all such cases, if the owner claims confiscation of his property will result, *the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment* * *.
>
> "Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state * * * the challenged order is invalid." (Our emphasis.)

The prohibitions of the 5th Amendment to the United States Constitution are measured by the settled scope of the 14th Amendment. This Court has said:

> "that the legal import of the phrase 'due process of law' is the same in both amendments."
>
> *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 329, 45 L. ed. 879, 884.

In *Twining v. New Jersey*, 211 U. S. 78, 101, 53 L. ed. 97, 107, it was pointed out that:

> "If any different meaning of the same words as they are used in the 14th Amendment (and in the 5th Amendment), can be conceived, none has as yet appeared in a judicial decision."

That the Circuit Court of Appeals could not, commensurate with due process of law to the City, have decided the question of burdensomeness as a matter of law, is true for at least two reasons:

1. The question of *res adjudicata* is a question of fact.[16]

2. The nisi prius courts are the only courts in which litigants have a *right* to be heard.

As to the first of the above reasons, the City was entitled to make its proof at the proper time in support of its allegations that neither the order of the Public Service Commission nor the cases relied upon by Chase were *res adjudicata*.

In *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U. S. 688, 692, 67 L. ed. 1176, 1181, the United States Supreme Court said that:

> "Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the Court as to *both law and facts*." (Our emphasis.)

It is settled law in Indiana by which this Court is bound, that whether matters adjudicated in a former action are one and the same as those alleged to have been decided in a former action, *is a question of fact*.

In *McSweeney v. Carney*, 72 Ind. 430, 433, an answer set up a former judgment. In passing on the answer, the Court said:

> "Whether said judgment was a full, final and complete adjudication of the matters set forth in the complaint was a question of fact."

In *Bottorff v. Wise*, 53 Ind. 32, 35, it was said:

> "In the third paragraph of the reply, it was averred that on the trial of the ejectment action between the parties to the present action, no evidence was offered or heard by the Court in relation to damages resulting from trespass or waste, and that the Court did not

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[16] There are decisions of other jurisdictions which hold that the question of *res adjudicata* is a mixed question of law and fact.

consider or determine any question with reference thereto. To this paragraph a demurrer was sustained, and this ruling is claimed to have been erroneous.

"The presumption is, that whatever matters were embraced by the issues were determined, but this presumption is not conclusive. Where a question of former adjudication is relied upon, it is competent for the other party to allege and prove by parol what questions were considered and determined by the Court or jury."

A long line of decisions by the Supreme and Appellate Courts of Indiana from which counsel have found no departure hold, first, that a judgment in a former suit is binding as *res adjudicata* in a subsequent action *only between the same parties*; second, that a former judgment is not *res adjudicata* in a subsequent action even between the same parties except when *the issues in the two cases are the same, unless* the exact point involved in the second case was actually litigated in the first suit and the facts have not changed; and third, that any judgment in a prior action cannot be successfully pleaded as a bar unless it is *mutually binding on the parties.*

In respect of the second of the above reasons it must be borne in mind that a hearing is a matter of right, and as pointed out by Mr. Justice Frankfurter in *Cobbledick v. United States*, 309 U. S. 323, 325, an appeal is a matter of grace. As also pointed out in the *Cobbledick* case (p. 325) it was not until 1889 that there was a review as of right in a criminal case. Since an appeal is a matter of grace, a decision by an appellate tribunal alone is not a satisfaction of due process of law as contemplated by the Fifth Amendment when the privilege of appeal may be taken away at any time.

A hearing in a trial court is a matter of right which is guaranteed and protected by the Fifth Amendment to the Constitution of the United States, and such hearing cannot be in an appellate tribunal.

It is a fundamental rule that in judicial proceedings affecting rights there shall be given an opportunity to be heard before any judgment, decree, order or demand shall be given and established.

Kuntz v. Sumption, Treasurer, 117 Ind. 1, 5.

For the Circuit Court of Appeals to hold that the lease is valid and binding on the City as trustee and on the trust property, and thereby to impose upon the City a liability of $45,000,000, and to hold that the lease is enforceable against the City as successor trustee and the trust property, when the question of the burdensome character of such lease was expressly reserved without objection or exception of any party made at the time (I R. 321), and when the City has had no opportunity to be heard either upon the law or the facts of this issue, is a denial to it of due process of law which is guaranteed to all by the Fifth Amendment to the Constitution of the United States.

If the Circuit Court of Appeals has this power, then the judicial department of the Government is the only department possessing the power to deny a hearing to litigants. If such power exists in the courts, then in consequence of their establishment to compel obedience to law and to enforce justice they possess the power to inflict the very wrongs which they were created to prevent. Judicial proceedings cannot be valid unless they proceed upon inquiry and render judgment only after trial. On the reserved issue of burdensomeness in the instant case there was no inquiry; there was no trial.

If the Circuit Court of Appeals were thus permitted to decide questions reserved by the District Courts for future trial, the whole purpose of the Rules of Civil Procedure could be abrogated. Rule 42 (b) grants to District Courts the right to reserve issues as was done in this case. The purpose of the trial court in reserving an issue is to simplify procedure and to minimize the cost of litigation. The rules in those respects are beneficial to liti-

gants. They are beneficial, however, only if litigants' rights are protected, but if a Circuit Court of Appeals can finally determine a question which was reserved as was done in this case without an opportunity to be heard, then the rights of litigants may be seriously imperiled by reliance on the reservation. Compare: *Montgomery Ward Co. vs. Duncan*, — U. S. — (decided Dec. 9, 1940).

Nothing short of a hearing to the City on the reserved issue of burdensomeness will satisfy the requirement of due process of law. No party should have its cause determined against it as has the City in this case without its day in court.

It is no answer to the argument of the City that it was denied due process to assert as does Chase (br. p. 51) that the decision of the Indiana Public Service Commission forecloses the question of burdensomeness. The Circuit Court of Appeals did not decide and could not have decided, as we point out hereafter (*infra*, p. 67), that the Public Service Commission possesses or could exercise judicial power. It expressly recognized that proceedings before the Public Service Commission were administrative in character. (IV R. 1286.)

Nor is it an answer to the City's argument that it was denied due process to contend as does Chase (br. p. 52) that the *Williams* case (206 Ind. 448) forecloses the question of burdensomeness. The scope and effect of the issues in the *Williams* case could not be passed on initially by the appellate court. In passing, we point out three of these reasons. First, Chase's predecessor trustee and the City were co-defendants in the *Williams* case and no issue was raised between them. Thus neither could plead *res adjudicata*. Second, since the decision in the *Williams* case the facts have changed decisively in that the City as successor trustee of a public charitable trust has taken over the trust property. Third, the causes of action in the two cases were different and the questions here involved were not actually litigated. These questions were either questions of fact or

mixed questions of law and fact. The City had a right to be heard upon these issues.

It is not an answer to the City's argument that it was denied due process to say that the motion of Chase to strike from the City's answer and counterclaim the allegations of burdensomeness (Chase br. p. 47) was a hearing on such issue of burdensomeness. As pointed out while Chase initially contended that burdensomeness was no defense, when the order of reservation of that issue was reserved, no objection or exception was made. Furthermore, no evidence was introduced respecting the burdensome character of the lease. The Circuit Court of Appeals did not pass on the denial by the District Court of the motion to strike. The ruling of the District Court was obviously not reversible error because the issue of burdensomeness was reserved.

In the initial briefs of both Chase and the City, it was pointed out to the Circuit Court of Appeals that the question of burdensomeness was reserved by the District Court for future trial. In the brief of the City in support of its petition for a rehearing, it was again pointed out that the issue of burdensomeness had been reserved by the District Court, and appropriate excerpts from the initial briefs of Chase and the City were set out wherein the reservation of the issue had been called to the Court's attention. (IV R. 1374, 1375, 1376.)

It is clear the City was denied due process of law by the Circuit Court of Appeals.

III.

LEASE UNENFORCEABLE AGAINST CITY.

The facts of this case lend no support to the contention of Chase that the City is bound by the terms of the lease for any reason.

Some of these facts are:

(1) A valid and enforceable trust was created by the franchise contract of 1905 and the other relevant trust instruments.

(2) The Settlors of the trust were the public spirited citizens of the City who subscribed for the stock of Citizens Gas.

(3) The beneficiaries of the trust were the gas users of the City.

(4) The trust res was the property and plant of Citizens Gas formerly owned by Consumers Gas Trust Company.

(5) Citizens Gas was the initial trustee of such trust with a fixed date for the expiration of its trusteeship, viz: 1939, or as soon thereafter as the transfer of the trust res to the City could be made.

(6) The City, a municipal corporation, was the successor trustee.

Todd v. Citizens Gas Co., 46 Fed. (2d) 855.

(7) No part of the property of Indianapolis Gas and no lease on any part of that property was a part of the trust res. Indeed, one of the underlying purposes of the organization of Citizens Gas was to provide a competitor for Indianapolis Gas.

(8) The trust instruments contain no authorization to lease or acquire the property of a competitor.

(9) The City did not sign or execute the lease of September 30, 1913. *The only parties to the lease are the lessor, Indianapolis Gas, and the lessee, Citizens Gas.*

(10) The City is not named as a party obligated by the lease.

(11) The City is not an assignee of the lease. An assignment was tendered and rejected. The evidence shows that this assignment was made in a separate written instrument, because the City had advised Citizens Gas prior

to September 9, 1935, the date of the transfer to the City as successor trustee, that it would not accept an assignment of the lease. (II R. 464.)

(12) No ordinance was ever adopted by the Common Council nor any resolution ever adopted by the Board of Public Works of the City authorizing the execution of the lease, or ratifying it or agreeing to be bound by its terms. No action was ever taken by the Board of Trustees or the Board of Directors of the Department of Utilities accepting the lease or agreeing to be bound by its terms. (City Stip. X 1, 2, 3, 4, III R. 982, 986, offered, II R. 424, 425.)

(13) The action of the Board of Directors of the Department of Utilities of the City rejecting the lease was ratified by an ordinance of the Common Council of the City. (III R. 1017, 1018, offered II R. 429.)

(14) The City has not accepted a part of a trust res and refused to accept another part. *It has accepted the entire trust res and rejected a lease which it claims the initial trustee had no power to impose upon the City.*

(15) *The complaint in this case will be searched in vain for an averment that the lease is valid. The theory of Chase is that the City is estopped to deny the enforceability against it of the lease and is bound by the principle of res adjudicata, which theory necessarily implies that the lease initially was unenforceable against the City.*

The Circuit Court of Appeals also erred in refusing to follow the Indiana decisions which hold that *a municipal corporation cannot be bound by a contract made in violation of the Indiana statutes.*

The lease was for a term of ninety-nine years. The Indiana statutes limit the making of such contracts to a term of not longer than twenty-five years.[17]

Section 254 of Chapter 129 of the Acts of 1905 provides that:

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[17] The relevant portions of Sections 85 and 254 of Chapter 129 of the Acts of 1905 appear as an appendix to this brief.

> "Any city * * * may enter into a contract with * * * any corporation * * * to furnish *such city* * * * *and its inhabitants* with * * * heat or light * * * provided that no such contract shall be entered into by any such city * * * for furnishing such *city* * * * *and its inhabitants* with * * * heat or light * * * for a term longer than twenty-five years." (Our emphasis.)

The same section also provides that any such contract by a city of the first-class, to which Indianapolis belongs, shall be first agreed to by the Board of Public Works, and thereafter there must be an ordinance of the common council approving and affirming it.

On September 30, 1913, when the lease between Indianapolis Gas and Citizens Gas was executed, Indianapolis Gas owned a complete by-product coke plant which was then producing artificial gas and a complete system of distribution mains, several hundred miles in length, and was furnishing gas to more than 41,000 consumers in Indianapolis. Its property was twice the size of that of Citizens Gas. (II R. 621, offered II R. 327.) When operations commenced under the lease all of these facilities were immediately used in supplying gas to the consumers residing on the lines of the Indianapolis Gas. It will thus be seen that through the medium of the lease there was an agreement to supply these 41,000 consumers in Indianapolis, or such of them as continued to take gas through the lines of Indianapolis Gas, with a supply of heat for the length of the term of the lease.

The ninety-nine year lease in question here was clearly within the terms of the statutes referred to, because the lease was a contract for supplying the city and its inhabitants with gas, heat, and light. *It was not authorized or approved by the Board of Public Works or by an ordinance of the common council.* (III R. 982, 983, offered II R. 424.)

By Chapter 190 of the Acts of the Indiana General Assembly of 1933 (page 928), it was provided that any mu-

nicipality within the State of Indiana shall have the power to operate and/or manage any utility without the approval or consent of the Public Service Commission or the intervention of such Commission in any way whatsoever. Thus the rates which any municipally owned utility may charge its consumers is not subject to the control of the Public Service Commission such as the rates to be charged by privately owned utilities; nor would a municipality be limited to a reasonable return upon its investment. The only check upon the rates charged by a municipality for its utility facilities is the weight of public opinion. Thus, both Sections 85 and 254 of Chapter 129 of the Acts of 1905 serve as a protective shield against unreasonable contracts. The lease in question here has no provisions for modification of the lease rental in accordance with any economic change and no remedy is open to the beneficiaries of the public charitable trust, if they are bound by the terms of this lease, for any adjustment as to rentals paid lessor Indianapolis Gas irrespective of what the economic conditions may be between now and the year 2012, when the lease expires. Even though artificial gas were to be displaced by some other fuel, the lease rentals would go on.

Sections 85 and 254 of Chapter 129 of the Acts of 1925 clearly indicate and define the public policy of the State of Indiana to be against contracts by municipal corporations for supplying the City or its inhabitants with gas and other utility commodities for a term longer than 25 years. The lease in question here is such a contract, is against public policy and is void.

A contract or lease by which a municipal corporation is sought to be bound, which has been made in violation of the Indiana statutes, is void and cannot be ratified.

Gaslight etc. Co. v. City of New Albany, 156 Ind. 406, 415;

City of Indianapolis v. Wann, Receiver, 144 Ind. 175, 187;

Hamer vs. City of Huntington, 215 Ind. 594, 600, 601.

In the first above cited case, the Indiana Supreme Court said:

> "It is elementary that municipal officers have no powers beyond those expressly conferred by statute or necessarily implied to enable them to make effective the powers granted or to protect the public welfare. Therefore, when they attempt an act that is beyond the limit of their power, the act has no official sanction and is no more effectual than if performed by non-official persons. As a municipal act it is wholly void and being void, nothing of substance may flow from it. * * * 'When a municipal council is authorized by statute to contract for a period not exceeding ten years, its contract for twenty years or for an indefinite time cannot be sustained as a contract for ten years but is entirely void * * *.'
>
> * * * * *
>
> Our conclusion is that appellee's ordinance of March 19, 1888 so far as it was attempted thereby to contract with appellant for lighting the streets and other public places of the city for a term of twenty-three years, was in violation of the Act of 1883 and was therefore *ultra vires* and void."

The lease being for a term of ninety-nine years, was absolutely void because the Indiana statutes limited the power of the City to contract, even with the approval of the Board of Public Works and the Common Council, to a term not longer than twenty-five years.

In leasing property, trustees are required to act with as great fidelity toward the remainderman in whom the title vests at the termination of the trust as towards those entitled to rents and profits during its continuance. Any other rule would jeopardize every estate so held and give countenance to the disregard by those in whom confidence has been reposed of the very object had in creating a trust.

In re: Hubbell, 135 Ia. 637, 113 N. W. 512;
21 *Ruling Case Law*, Sec. 153, p. 1301.

In the *Hubbell* case it was said that:

> "It will be noted that in no case to be found in the books after *Denagree v. Walker* (Ill. 1905), 73 N. E. 409, *has a lease by trustees for ninety-nine years unless expressly authorized been approved.*" (Our emphasis.)

The Circuit Court of Appeals was also in error in refusing to follow the Indiana decisions and the decisions of this Court which hold that a grant of right or privilege by a municipality is strictly construed against the grantee, and that whatever is not unequivocally granted is withheld —nothing passes by implication. The Circuit Court of Appeals said that:

> "The power to execute this ninety-nine years lease was authorized by the Commission in 1913." (113 F. 2d 217, 221.)

The Court refers to the Public Service Commission of Indiana. Thus it apparently holds that the act creating the Public Service Commission gave to it the power to abrogate the contract between the City and Citizens Gas as expressed in the trust instruments, including the corporate charter of Citizens Gas.

The Citizens Gas charter was neither legally abrogated nor legally altered by the enactment of the statute creating the Commission. (Chap. 76, Acts 1913.) In *Todd v. Citizens Gas*, 46 F. 2d 855, 868, the Circuit Court of Appeals said:

> "We find nothing in the language of the statute (Chapter 76, Acts 1913) or in the decisions of Wisconsin prior to its enactment which would indicate an intention on the part of the Legislature that a public utility, by surrendering its franchise, might *thereby destroy vested property rights which it had voluntarily created, and release itself from obligations respecting those rights which it had voluntarily undertaken before the existence of the franchise and as an inducement to the municipality to make the grant of the privilege.*" (Our emphasis.)

The proposition that the charter of a corporation such as Citizens Gas cannot be changed by subsequently enacted laws unless there is reserve power so to do, is settled by the case of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629.

As pointed out before in this brief, the Public Service Commission had no power to determine the validity of the lease and could bind no one on that proposition.

The Circuit Court of Appeals held in its opinion (p. 225) that:

> "The terms of the trust (the franchise contract and the articles of incorporation) referred generally to the duties of the trustee and the rights of the beneficiaries * * *."

On page 227 the Court said:

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remain silent on the subject of trustee's powers. The only applicable language relates to duties and not to powers."

The trust instruments were the franchise contracts with the City and Citizens Gas, and the articles of incorporation of Citizens Gas. Since part of the trust instruments were the franchise contract from the City which was a grant of right for the use of the streets and alleys for the laying of gas mains, and the other part of the trust instruments was the corporate charter of Citizens Gas carrying out the directions of the franchise contract respecting rights, powers and duties, the rule announced by this Court in *Piedmont Power & Light Co. vs. Town of Graham, et al.*, 253 U. S. 193, 194, 195, 64 L. ed. 855, 857, and the rule announced by the Indiana Supreme Court in *Indianapolis Cable Railroad Co. v. Citizens Street Railroad Co.*, 127 Ind. 369, 390, are controlling. In the latter case the Indiana Supreme Court said (p. 390):

"A grant made by the commonwealth or by a municipal corporation under authority from the commonwealth is to be taken most strongly against the grantee and nothing is to be taken by implication against the public except what necessarily flows from the nature of the terms of the grant."

In the *Piedmont Power* case, this Court said that:

"Grants of rights and privileges by a state or municipality are strictly construed, and whatever is not unequivocally granted, is withheld—nothing passes by implication."[18]

Thus, if the terms of the trust remain silent on a trustee's powers, as the Circuit Court of Appeals said, and which is the fact, the power to make the lease cannot be implied.

It is not without significance that the trust instruments contain detailed instructions respecting many matters but failed to grant the power, either expressly or by reasonable implication, for the making of a ninety-nine year lease. The instruments contained detailed instructions respecting the retirement of the stock (I R. 84); the power to purchase gas mains of Consumers Gas Trust Company (I R. 85); the manner in which work could be done in the streets, service pipes laid, mains laid (I R. 87); the materials which were to be used; the quality of the gas; the price of the gas (I R. 88); the refilling of excavations; the maintenance of an emergency fund (I R. 89); the type of meters to be used; the tests for meters. (I R. 92.) The articles of incorporation of Citizens Gas provided in detail the order in which the earnings should be used (I R. 98); and the duties of the officers. (I R. 103.)

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[18] See also

Knoxville Water Co. v. Knoxville, 200 U. S. 22, 34, 50 L. ed. 353, 359;

Blair v. Chicago, 201 U. S. 400, 471; 50 L. ed. 801, 830;

Mitchell v. Dakota Central Telegraph Co., 246 U. S. 396, 412, 62 L. ed. 793, 801.

It is also quite significant that both the franchise (I R. 83) and the articles of incorporation (I R. 97) provided that any member of the Board of Trustees may be removed by the Marion Circuit Court upon the showing that the trustee is an employee or holder of any of the securities or capital stock of any other company organized for the purpose of manufacturing or delivering gas to consumers in the vicinity of the City of Indianapolis.

Citizens Gas, in its franchise contract, bound itself to extend its lines and mains so that "all the inhabitants of said city may be supplied with gas for fuel and lighting purposes when they may reasonably require the same." (I R. 89, 90.)

It seems wholly unreasonable to assume, as the Circuit Court of Appeals has done, that there was implied power in Citizens Gas to execute a ninety-nine year lease when no word appears in the trust instruments granting it that power, either expressly or by necessary implication, and that when the trust instruments themselves so completely circumscribe the authority of the grantees in respect of other matters less important to the welfare of the corporation and beneficiaries of the trust than the power to harness the trust estate with a ninety-nine year lease. Such implied power in the trust instruments is also wholly inconsistent with the obligation of Citizens Gas to extend its lines to all citizens of Indianapolis. The answer to all of this is that there was no power, either express or implied, to enter into a ninety-nine year lease.

IV.

RULE OF ERIE RAILROAD CO. vs. TOMPKINS.

The Circuit Court of Appeals erred in refusing to follow the rule announced by this Court in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, 78, 82 L. ed. 1188, 1194, in that it refused to follow the controlling Indiana decisions which reach back in an unbroken line to early statehood

and extend to the latest decision of the state's highest appellate tribunal.[19]

1. Doctrine of Estoppel sought to be asserted by Chase.

Chase alleged in its complaint and asserts in its brief that the City is estopped by its conduct from denying the enforceability of the 99 year lease against it. The conduct upon which Chase relies is as follows:

(a) Chase contends that Citizens Gas is estopped, thereby through privity of estate it alleges the City also to be estopped. The chief reasons relied upon by Chase for estoppel against Citizens Gas is the authentication of bonds of Indianapolis Gas by the trustee and their sale by Citizens Gas to reimburse it up to 90% of expenditures for extensions and improvements made to the property, the operation by Citizens Gas of the Indianapolis Gas property, and the acceptance and enjoyments of the profits from such operation. (I R. 11, 12.)

(b) The resolution of the Board of Public Works of the City dated March 20, 1929. (I R. 12, 18.)

(c) The payment by the City of the bondholders and the common and preferred stockholders of Citizens Gas. (I R. 15, 19.)

(d) The issuance and sale by the City of its revenue bonds. (I R. 14, 15, 19.)

(e) The transfer to the City by Citizens Gas of the trust property on September 9, 1935. (I R. 16, 19, 298.)

(f) The resolution and agreement for temporary use by the City of Indianapolis Gas property. (I R. 17, 297.)

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[19] The Circuit Court of Appeals made no express holding on the question of estoppel *in pais* but apparently relied upon such estoppel and Chase, in its brief, attempts to assert estoppel against Citizens Gas and the City. (Brief pp. 10, 11, 118-132.)

(g) The City's performance under the lease. (In reality this is the same as (f) above.)

(h) The execution by the City of an agreement to Citizens Gas, indemnifying it against certain liability.

(i) The alleged approval by the attorneys for the City of a bond circular issued in connection with the sale of the City's revenue bonds.

(j) The laches of the City in denying the validity of the lease and its binding effect for the full term.

Attention is directed to the fact that all claimed acts of estoppel except (a) and (b) occurred after 1931.

Reference will be made to the various alleged acts claimed to estop the City in the same order as presented above.

(a) Citizens Gas is not estopped by its conduct and therefore the City is not estopped through privity of estate.

By the terms of the mortgage Indianapolis Gas could reimburse itself up to ninety per cent of the amounts expended for the property by authentication and sale of its bonds. By the terms of the lease Citizens Gas was permitted to do likewise. Chase contends that certain representations made in connection with the sale of these bonds by Citizens Gas and that certain statements appearing in Poor & Moody's Manuals estop it.

The representations spoken of were made to Blodgett & Company by J. D. Forrest, who was General Manager and Secretary of Citizens Gas. The bonds were sold to Blodgett & Company as investment brokers and not to the public.

There is absolutely no showing *and not even an attempt to show that any present bondholder of Indianapolis Gas knew of or relied upon any of such statements made* by For[illegible]st or those which appear in Poor & Moody's Manuals, nor is there any proof in the record that any officer or director of Citizens Gas knew of or ratified the statements made by Forrest.

The circulars issued by Blodgett & Company do not support Chase's contention that Citizens Gas is estopped.

Mr. Chester M. Clark, who was associated with Stone & Webster and Blodgett, Inc. (II R. 555), said that those two corporations had the custody of the files of the old partnership of Blodgett & Company. Mr. Clark testified that all he knew about Exhibits 3 to 12 (II R. 593-615) which consisted of certain circulars and other material, was that he found them in the files of Stone & Webster and Blodgett, Inc., and that they had been turned over by Blodgett & Company in about 1926; that he had no personal knowledge of who prepared them, and that the only information in connection with those papers that he had was that which he could gather from the face of the papers themselves. (II R. 568.)

Mr. Baker, who became associated with Blodgett & Company in 1919 and subsequently became an officer, director and shareholder of Stone & Webster and Blodgett, Inc. (II R. 569), testified on cross examination that he assumed that the lease was available to the counsel of his firm at the time that his firm bought bonds of Indianapolis Gas. (II R. 584.) Subdivision 32 of the lease was read to Mr. Baker. (II R. 584.) Subdivision 32 provided that:

> "In event it should be determined by a court of final jurisdiction that this contract is *ultra vires* or void because of the length of term created and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the longest term for which the parties hereto might lawfully contract." (II R. 584.)

He was then asked if that was not a red flag of warning as to the question of whether the lease was valid for a term of ninety-nine years, and he answered: "It would seem so to me." (II R. 484.)

In connection with the purchase by his company of Citizens Gas bonds, he said that he remembered discussing

the franchise between the City and Citizens Gas on various occasions (II R. 585); he knew that the franchise required the Citizens Gas Company to be wound up twelve years before the bonds became due in 1952. (II R. 586.)

When asked on direct examination whether or not purchasers of bonds relied upon statements contained in the circular, Mr. Baker said: "I cannot tell you the working of the minds of the buyers." (II R. 575.)

(b) The resolution of the Board of Public Works does not estop the City. (II R. 327.) The resolution makes no mention of the lease. The demand of the City made by the resolution is limited to the right, title, interest and ownership to the gas plant, mains and property of Citizens Gas which it acquired through the medium of the instruments creating the public charitable trust. The resolution of Citizens Gas (II R. 673, offered II R. 237) recognized the trust created by the franchise and the articles of association of Citizens Gas and the right of the City to take over the property and the assets of Citizens Gas.

Citizens Gas recognized the limited scope of the resolution of the Board of Works of the City. It is a fair inference to be drawn from the two resolutions, that there was no intention to include the lease.

(c) The paying off by the City of the bondholders and the common and preferred shareholders of Citizens Gas is of no aid in asserting estoppel against the City. In the exercise by the City of its right to take over the trust res and its discharge of the obligations of the corporation to the bondholders and stockholders of Citizens Gas, the City did no more than to accept the property of a public charitable trust and to perform the conditions precedent to the acquisition of that trust property as such conditions were laid down in the case of *Todd v. Citizens Gas* (46 F. 2d 855).

(d) In the sale of its revenue bonds the City did nothing which affords a basis for an estoppel against it. The

revenue bonds were not sold to the public. No revenue bondholder is a party to this action. Chase seeks to base its estoppel on statements appearing in an advertising circular issued by the brokers who sold the revenue bonds.

The Boards of Trustees and Directors of the Utility District are the only agencies having any power to deal with the trust res. Such agencies never authorized anyone to make any representations in connection with the bond circular or in the bond circular itself, but expressly advised a representative of the bond purchasers that the City had no authority to do anything in connection with the issuance of the bonds except to sell them. (II R. 510-512, offered II R. 420; II R. 436-440.)

No bondholder of the revenue bonds is a party to this action.

(e) The transfer of the trust res to the City by Citizens Gas on September 9, 1935, neither amounted to an acceptance by the City of the leased property nor does it form the basis of an estoppel. Chase contends that the City's acceptance of the trust property included acceptance of the leasehold estate and the consequent obligations under the lease, and that the City accepted an assignment of the lease. The City accepted the trust property and expressly rejected an assignment of the lease. The Circuit Court of Appeals, in speaking of the assignment of the 99 year lease tendered to the City (together with three other instruments of transfer), said:

> "These instruments were received, retained and duly recorded by the City."

On August 27, 1935, Mr. Sparks, one of the attorneys for Citizens Gas, was advised that the City would reject the lease. (II R. 464.) This knowledge was one of the inducing reasons why four separate instruments were executed, one of which was the assignment of the 99 year lease. The City rejected the lease on September 9, 1935, on the very day that the assignment was tendered (II R.

468), and on the same day that the assignment was tendered, the Board of Directors for Utilities adopted a resolution rejecting it. (I R. 139.)

When the City served on Indianapolis Gas a rejection of the lease there was no doubt in the minds of Indianapolis Gas and its counsel that the City had in fact rejected the lease.

The claim by Chase that the City accepted an assignment of the lease is an afterthought of Chase's counsel.

This fact is conclusively established by action taken at a special meeting of the Board of Directors of Indianapolis Gas held on November 6, 1935. (City Exhibit 7C, III R. 1013 Offered II R. 428.)

That meeting was attended by both Mr. Ewbank and Mr. Higgins, counsel for Indianapolis Gas in this case, who were members of the Board. The following motion was unanimously adopted:

> "Resolved, That the Secretary of the Company be instructed to formally notify The Chase National Bank of New York, as Trustee of the First Mortgage Bonds of The Indianapolis Gas Company, *of the refusal of the City of Indianapolis to accept the assignment of the ninety-nine years lease made and executed in 1913 between this Company and the Citizens Gas Company of Indianapolis*, and to further advise said Bank, Trustee, of the formal development and situations surrounding the present operation of the Company's property, by sending them a letter stating substantially as follows:
>
> The Chase National Bank,
> 11 Broad Street,
> New York, N. Y.
>
> In Re: The Indianapolis Gas Company
> Deed of Trust dated Oct. 1, 1902.
>
> Gentlemen:
>
> Pursuant to a resolution adopted by the Board of Directors of The Indianapolis Gas Company, the following facts relative to the property and business of

the Company are sent to you as Trustee of our First Mortgage 5% Bonds.

Assuming to act under legislative authority and pursuant to provisions of the city franchise and articles of incorporation of the Citizens Gas Company of Indianapolis, the City of Indianapolis has taken over the property of that Company, and is now operating the same by its Board of Directors for Utilities, and is assuming to enter upon the discharge of the obligations of the Citizens Gas Company to its bondholders and stockholders. The City of Indianapolis, however, has refused to accept an assignment of the ninety-nine year lease, executed on September 30, 1913, by this Company to the Citizens Gas Company, by which all the property of this Company was leased to the Citizens Gas Company.

Under the circumstances, this Company, through action of its Board of Directors, entered into a stipulation with the said City of Indianapolis, by which it was provided that the City, through its Board of Directors for Utilities, will continue the operation of the property of this Company for a period of six months pending negotiations, and that they will pay an amount for rental for said period equal to the amount of rental payable according to the terms of the lease. Preliminary meetings between representatives of this Company and representatives of the City have resulted in nothing definite.

Our Board of Directors is attempting to safeguard the legal position of both the bondholders and stockholders of the Company and have retained Hon. Newton D. Baker of Cleveland, Ohio, as additional counsel. The Indianapolis Gas Company will be pleased to receive any suggestion you desire to make in the premises.

Very truly yours,

THE INDIANAPOLIS GAS COMPANY,

By .....*Secretary.*"

(III R. 1013 offered II R. 428.)

There is also no doubt that Chase understood exactly what the City had done or was trying to do. In a letter dated September 19, 1935, addressed to William G. Irwin, President of Indianapolis Gas, and signed by Mr. Beardslee, Assistant Trust Officer of Chase, the following statements are made:

> "Indianapolis Gas Company First Consolidated 5% Bonds due October 1, 1932.
>
> Dear Sir:
>
> We are receiving numerous inquiries from holders of bonds of the above described issue with respect to newspaper reports that the City Utilities District *is attempting to abrogate the lease* made by your Company with the Citizens Gas Company in 1913. Bondholders state that such action would materially affect the security of their bonds and we would be obliged if you will be good enough to write us such information as we can pass on to bondholders with respect to this situation.
>
> We will also be obliged if you will forward us a copy of the above mentioned lease and also advise us what action is being taken to protect the interests of the bondholders." (Our emphasis.) (III R. 926 offered II R. 369.)

At the trial of the cause, it was admitted that the instruments, which included the assignment of the lease, "were presented to the Recorder of Marion County, Indiana for recordation * * * on the 9th day of September, 1935." (II R. 330.)

When the entire transaction is viewed, there was not then and cannot be now, any doubt in the minds of anyone that the City intended to and did reject the lease.

(f) Neither the resolution nor the agreement for temporary use by the City of the property of Indianapolis Gas affords a basis for an estoppel against the City.

The reason for the operation by the City of the property of Indianapolis Gas was solely to prevent the inter-

ruption of service to the gas consumers in Indianapolis. (I R. 200.) It was expressly provided that the City was not acting under the lease or to be considered as acting under it, or as having adopted it in any respect or as having recognized said lease as an obligation in any manner. The resolution also provided that if Indianapolis Gas would not permit such temporary use, that the City would at once discontinue such use and relinquish such temporary possession to Indianapolis Gas as the City may have temporarily exercised over the property. The City and Indianapolis Gas on March 2, 1936, extended the temporary use agreement of September 9, 1935. (I R. 205, 206, 207.)

By the March 2d agreement the City agreed to deposit in escrow and has deposited since said time, a sum of money equal to each semi-annual installment of interest on the Indianapolis Gas bonds and dividends on said stock. The agreement also provided that the payments made thereunder were made without prejudice to the City's possession respecting the invalidity of the lease, and that the operation of the property or the payments made pursuant to the agreement were not to constitute an admission that the lease was valid or binding on the City or its Department of Utilities. (I R. 207.) Chase was advised on March 11, 1936, of this agreement.

(g) The City's performance under the lease is no ground for estoppel. The City's operation of the property as pointed out under (f) above was under an agreement with Indianapolis Gas whereby the City did not admit nor was it to be considered as having admitted the validity of the lease. Chase cannot sit by after knowing of the agreement and permit the City to deposit money for the ultimate benefit of its bondholders, and at the same time read out of the agreement for temporary use the provision that performance under the agreement is not to affect the rights of the City.

Indeed Chase is seeking, on the one hand, to reach that fund for the payment of interest and interest on interest on its bonds and at the same time is seeking to repudiate the agreement through its counsel by asserting that the operation of the property of Indianapolis Gas pursuant to the terms of that agreement estops the City from denying the invalidity of the lease although in the agreement it was contracted otherwise.

(h) The City is not estopped, as Chase contends, by the execution of the indemnity agreement to Citizens Gas. A reading of this agreement clearly demonstrates that it was not intended in any sense to impose any liability on the City in respect of the lease. What it did bind the City to do was to protect Citizens Gas from any liability on account of pending actions at law or equity and "on account of any actions or suits which may hereafter be brought against said Company arising from any or all acts or actions or omissions to act on the part of said Company (Citizens Gas) of any nature whatever."

Citizens Gas attempted to assign the lease to the City. There was therefore no omission to act on its part which would even fall within the literal meaning of the language of the indemnifying agreement.

The conclusive answer to Chase's contention is that the indemnifying agreement was not intended to bind the City to the lease *because it was a part of an entire transaction of acts done on the same day (September 9, 1935), and one of those acts was a rejection of the lease.*

(i) Chase also seeks to predicate an estoppel on an alleged approval by the attorneys for the City of a bond circular issued by brokers in connection with the sale of the City's revenue bonds.

The testimony of Robert E. Simond, Vice-President of Halsey, Stuart & Company (II R. 510-512 offered II R. 420), and the testimony of Brodehurst Elsey, Vice-President of the Board of Directors for Utilities (II R. 436-440,

shows that Halsey, Stuart & Company and Otis & Company requested the City to approve a bond circular and that both brokers were advised by Mr. Elsey, in the presence of one of the attorneys for the City and its Department of Utilities, that the City had no power to do anything in connection with the sale of revenue bonds except to advertise and sell such bonds and that the City would not approve any bond circular whatever.

Mr. Simond sent a copy of a proposed bond circular to Mr. Albert L. Rabb, one of the attorneys for the City and its Department of Utilities. On cross examination Mr. Simond said that the circular was mailed to Mr. Rabb individually and that this was done because of the prior conference in which he had been advised that the City would not approve the circular. (II R. 511-512.)

(j) Chase also contends that the City is precluded by its laches from asserting the invalidity against it of the lease. As pointed out hereinabove, as early as August in 1935, the City advised Citizens Gas that it would reject an assignment of the lease. Also, as pointed out above, at the time of the transfer of the property comprising the trust res that the City by resolution of its Board of Directors rejected the assignment of the lease and served such rejection on both Citizens Gas and Indianapolis Gas. It is difficult to understand how the City could be guilty of laches when nearly a month prior to the time it exercised its right to take over the trust property it notified Citizens Gas that it would reject an assignment of the lease and when on the very day that the property was transferred to the City it rejected the assignment of the lease and notified both Citizens Gas and Indianapolis Gas of such rejection and that it would not be bound by the terms thereof.

The rule in Indiana is that the doctrine of estoppel has no application where the other party was not influenced by the acts pleaded as an estoppel.

Ross, et al. v. Banta, 140 Ind. 120, 150;
Hosford v. Johnson, et al., 74 Ind. 479, 485.

In the case first above cited, the Indiana Supreme Court had before it the question of estoppel by conduct. It said:

> "The doctrine of estoppel *in pais* has no application * * * where the other party was not influenced by the acts pleaded as an estoppel * * *.
>
> Persons who set up acts of another as an estoppel must show that they acted upon the same and were influenced thereby to do some act which would work injury if such other party is allowed to deny the truth of what he did."

In the *Hosford* case the Indiana Supreme Court said:

> "To constitute an estoppel by conduct there must be: (1) A representation or concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; (5) the other party must have been induced to act upon it."

It is also well settled in Indiana that an estoppel against a municipal corporation cannot be founded upon acts done by municipal officers in excess of their authority. Anyone who deals with public officers is charged with notice that such officers possess only limited, naked statutory powers, and must at his peril ascertain the scope of their lawful authority. No person dealing with officers of a municipal corporation can found a claim against the municipal corporation on the basis of an estoppel where that estoppel necessarily rests on acts done by officers in excess of their statutory authority.

In *Platter v. The Board of Commissioners of Elkhart County*, 103 Ind. 360, 381, the Board of County Commissioners wished to relocate the county poor farm. They sold the old and purchased a new one. Upon change of membership of the Board, a proper offer and demand of

rescission of the contract was made. After refusal of the Board's offer and demand of rescission the Board sued. Among the answers made, estoppel was urged.

The Court said:

> "The appellant can not successfully build upon the doctrine of estoppel. For this conclusion there are at least two satisfactory reasons: *First.* He dealt with public officers with limited, naked statutory powers; he was bound, at his peril, to ascertain the scope of their authority, and can not found any claim upon acts done by those officers in excess of their statutory authority. This general rule is thus stated by the Supreme Court of the United States: 'Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity.' The rule is well established by our own decisions. *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Art v. Jackson School Tp.*, 90 Ind. 101; *Pine Civil Tp. v. Huber, etc., Co.*, 83 Ind. 121.
>
> "The disobedience of a statute by a public officer creates an incurable difficulty. It can not be remedied or removed by subsequent confirmation of the original acts, whatever the form the confirmation assumes. There is well defined distinction between public and private corporations, and the general doctrine of estoppel does not apply to the former class of corporations. *Union School Tp. v. First Nat'l Bank, supra*; *Cummins v. City of Seymour*, 79 Ind. 491; *Driftwood, etc., T. P. Co. v. Board, etc.*, 72 Ind. 226.
>
> "A public corporation, such as a county or city, is composed of the inhabitants of the locality, and the officers are not agents in the strict sense of the term, but are persons acting in an official capacity."

In *Cummins v. City of Seymour*, 79 Ind. 491, 496, in speaking of the liability of a municipal corporation, the Court said:

> "'If the act done is committed outside of the authority and power of the corporation as conferred by

statute, the corporation is not liable whether its officers directed its performance or it was done without any express direction or command.' "[20]

The power of a city in Indiana to sell property devoted to any public use is restricted, and to enable the city to make a sale of such property, special authority must be granted to it by the Legislature. Property so held is held upon a trust for the benefit of the inhabitants of the city. The city, as trustee for such use, cannot by an unauthorized act destroy that trust.

Lake County Water & Light Co. v. Walsh, 160 Ind. 32, 39.

This same wholesome principle is applicable when an attempt is made to impose upon a trust a large annual obligation for 99 years without statutory authorization. There was no power conferred by legislative act upon the initial trustee of this public charitable trust to execute a 99 year lease.

It is apparent from the foregoing that there can be no estoppel against the City to deny the enforceability against it of the lease. There is no proof in this case that any act or representation made by either Citizens Gas or the City was relied upon by any bondholder of Indianapolis Gas nor is there any proof that any such bondholder purchased his bonds on the faith of such acts or representations. (II R. 340, 344, 355, 357, 361, 362, 397, 568, 584, 589.) There is no proof that any act of Chase was based on any representation made by either Citizens Gas or the City.

So far as the evidence in this case shows, the last purchase made of Indianapolis Gas bonds was made in 1951 except those purchased by Citizens Gas in 1952. (Stip. 9, II R. 618, 620; Stip. 10, II R. 627.)

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[20] See also *Union School Township vs. First National Bank of Connersville*, 102 Ind. 464, 476; *Citizens Bank of Anderson vs. Town of Barnetteville*, 98 Ind. App. 92, 102.

2. Order of the Public Service Commission of Indiana.

It is the contention of Chase in its complaint (I R. 8, 9, 10) that the order of the Public Service Commission entered on the 1st day of October, 1913, approving the lease (I R. 116-122) determined the validity of the lease and is therefore binding on everyone, including the City.

Chase contends in its brief not that the order is conclusive as to all of the issues but that "the order is a conclusive determination of two matters of fundamental importance, (1) that the lease is in the public interest and consequently in the interest of the beneficiaries of the trust, and (2) that the lease is in fulfillment of the duties of Citizens Gas as a public utility."

To find that the lease is in the public interest is not a finding against the beneficiaries of a public charitable trust. The Commission has only administrative and ministerial powers. The Public Service Commission is purely a regulatory body having jurisdiction over public utilities. It has no judicial power to decide private questions between public utilities and individuals such as the beneficiaries of the Public Charitable Trust.

When Chase says (br. p. 91) that the order of the Commission conclusively determined "that the lease is in fulfillment of the duties of Citizens Gas as a public utility," it is mistaken if it means thereby that the Commission had the right to determine that the lease was in fulfillment of the duties of Citizens Gas to either the beneficiaries of the public charitable trust or to its successor trustee. As pointed out in the preceding paragraph, the Commission has no such power.

Continuing then, Chase argues (br. p. 92) "the Commission's order, plus the statute, are conclusive as to the power of Citizens Gas to enter into the lease."

This in reality is simply saying that the order of the Public Service Commission determined that the lease was within the power of Citizens Gas to execute and the

as successor trustee is thereby bound by the act of the initial trustee.

The Public Service Commission which was created by Chapter 76, Acts of the General Assembly 1913 (p. 167), is an instrument of the executive department of the State. It is neither legislative nor judicial in character.

The approval of the lease by the Public Service Commission could not operate in any way as an adjudication of the enforceability of the lease against the City.

Such an order is not judicial, but wholly administrative, in character.

The authority given to the Public Service Commission to fix rates and approve leases of public utility property was given for the sole purpose of enabling the Commission to protect the public interest. It was never intended that by conferring such jurisdiction on the Commission it should be vested with authority to make a judicial declaration which would determine private rights of persons not parties to the lease, especially where such private rights depend upon the decision of justiciable questions.

The entire purpose of the statute is to safeguard the public interest and to see that leases or sales are not made by one utility to another unless in the opinion of the Commission they are in the public interest.

Any assertion directly or indirectly that the Commission's approval of the lease determined the liability of the City in respect of the obligations contained in the lease is made in disregard not only of the obvious purpose of the statute and the scope of the Commission's authority thereunder, but also in complete disregard of the repeated decisions of the Supreme Court of Indiana.

In referring to Section 95 of the Shively-Spencer Act, the Indiana Supreme Court said:

> "But by this enactment, the Legislature has vested it (Public Service Commission) with authority subject to review by the courts, to supervise or regulate the

terms of sale *insofar only as they affect the public.*" (Our emphasis.)

In re: Northwestern Telephone Co., 201 Ind. 667, 680, 685.

In *Stratton v. Railroad Commission* (1921), 186 Calif. 119, 198 Pac. 1051, 1054, 1055, in speaking of a decision of the California Railroad Commission, the Court said:

> "The Commission decided that the company was a public utility, but denied the relief asked for. The claim now is that this decision as to the character of the company is *res judicata*. There is more than one answer to this, but one alone need be given. It is that the Commission is not a judicial tribunal in the strict sense, although many of its functions are quasi judicial, so that its orders are not judgments, and in particular its findings of fact are not adjudications, *and facts found by it are not res judicata and as such finally and conclusively established between the parties for all purposes.*
>
> • • • • •
>
> The peculiar effect of a determination of fact operating to conclude the question for other purposes than those of the very proceeding in which the determination is made is confined to strictly judicial determinations alone, and an order of the Commission is not of that character." (Our emphasis.)

In Section 32 of the lease (I R. 79, 80) it is provided in substance that in the event that a court of final jurisdiction should determine the lease to be *ultra vires* and void because of the length of the term created, and that the term is in excess of the authority of either party to contract, then the lease shall be binding upon the parties, viz: Indianapolis Gas and Citizens Gas, for the longest term for which the parties might lawfully contract.

In view of this provision of the lease, even if the order of the Public Service Commission could be treated as a determination of the validity of the lease for the period

during which Citizens Gas was trustee, which we deny, it is clear that the order merely approving the lease could not operate to determine the validity of the lease beyond that term.

The parties themselves had serious question as to the binding effect of the lease after termination of the franchise period. All that their petition to the Commission could amount to legally was a request that the lease be approved for such term as was thereafter determined to be legally binding, not by the Commission but by some court having power to decide a justiciable controversy.

It is well settled that the Public Service Commission is "purely an administrative or legislative body without judicial power."

Public Service Commission of Indiana et al. v. City of LaPorte et al., 207 Ind. 462, 465;

New York etc. R. R. Co. v. Singleton et al., 207 Ind. 449, 458;

In re Northwestern Indiana Telephone Co. et al., 201 Ind. 667, 171 N. E. 65.

Under the terms of the Indiana Constitution (Article III, Section 1) the powers of the State Government are divided into three separate departments, legislative, the executive, including the administrative, and the judicial and it is provided that:

> "No person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Under the above quoted provision of the Indiana Constitution the General Assembly could not have conferred any judicial power upon the Public Service Commission.

We have not overlooked the well established rule that where the Public Service Commission has jurisdiction conferred upon it to decide questions of fact and enter

an order thereon, that so long as it acts within its jurisdiction, its decision is conclusive upon the courts in a collateral action.

Public Service Commission et al. v. City of Indianapolis et al., 193 Ind. 37, 43.

The order of the Public Service Commission approving the lease went no further, and could go no further, than a determination that upon the facts adduced, it was advisable *and in the public interest* (but not necessarily in the interest of the beneficiaries of the trust) that the property of Indianapolis Gas be leased to the Citizens Gas on the terms stated in the Commission's order. The Commission had no power to decide either the liability of the City under the terms of a lease not executed by it, or the length of the term of the lease for which the parties might lawfully contract.

The Commission could not and did not determine the legal questions now arising in these cases.

It is interesting to note that Chase cites in support of its proposition (p. 90) the case of *Batesville Telephone Co. v. Public Service Commission*, 38 Fed. 2d 511 at 515. This case is hardly authority for the proposition since it was reversed in *Batesville Telephone Co. v. Public Service Commission of Indiana* (1931) (46 Fed. 2d 226, 228.)

At the date when the Public Service Commission (October 1, 1913, I R. 122) approved the lease, no claim had been asserted that the franchise contract of 1905 and the other related papers resulted in the creation of a public charitable trust, and at that time (1913) it was still seventeen years before the date when a transfer was to be made to the City.

It is difficult to understand how an order by the Public Service Commission made 17 years before the City took over the trust property could determine the validity of the lease against the City.

3. Doctrine of res adjudicata.

Chase in its bill alleges that certain cases were *res adjudicata* of the validity and enforceability of the lease against the City, viz.:

(a) *Fishback v. Public Service Commission, et al.*, 193 Ind. 282. (I R. 10.)

(b) *Todd v. Citizens Gas*, 46 F. (2d) 855. (I R. 13.)

(c) *Williams v. Citizens Gas, et al.*, 206 Ind. 448. (I R. 14.)

The Circuit Court of Appeals apparently relied on these decisions as *res adjudicata* of the validity of the ninety-nine year lease against the City, for it said:

> "In passing, it might be said that the few cases discussed in the opinion above are determinative of the immediate issue here, i.e. as to the validity of the ninety-nine years lease."
>
> It then cited the above cases. (I R. 1300.)

In holding that the above cited cases were *res adjudicata* of the validity of the ninety-nine year lease against the City, the Circuit Court of Appeals erred in that it refused to follow the rule announced by this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64, 78 because under the Indiana law as expressed by a long line of decisions to which counsel have found no exception, none of the above cases is *res adjudicata* of the issue respecting the validity of the lease against the city.

(a) The Fishback Case.

Chase now contends not that the *Fishback* case is *res adjudicata* as it alleged in its complaint (I R. 10) but that its importance lies in the conduct of Citizens Gas and the City in upholding the validity of the lease for eight years. (Br. p. 92.)

On November 28, 1913, Fishback, who had appeared before the Public Service Commission and opposed the

approval by the Commission of the lease of September 30, 1913, commenced an action in the Superior Court of Marion County against Public Service Commission of Indiana, Citizens Gas Company, Indianapolis Gas and the City to vacate and set aside the order approving the execution of said lease.

Fishback sued as a stockholder of the Citizens Gas and a resident freeholder of Indianapolis and not as the beneficiary of a public charitable trust. (II R. 650.) The defendant Citizens Gas and the City were not made parties defendant as the trustees of a public charitable trust There was no averment in any of the ten paragraphs of complaint that a public charitable trust had been created by the franchise contract of 1905. (II R. 648-668, offered II R. 327.)

Fishback sought to set aside the Commission's order on the following grounds:

(a) That the rentals fixed in the lease were excessive and that their payment by the Citizens Gas would result in a waste and misapplication of its funds and its inability to pay dividends due its stockholders. (II R. 651, 664.)

(b) That the Citizens Gas was without power to enter into the lease without the consent of the owners of three-fourths ($^3/_4$) in amount of its capital stock, which consents had not been obtained. (II R. 668.)

(c) That the City had not given its consent to such lease, had not joined in the execution thereof, and had granted to that Company no right to operate the property of the Indianapolis Gas. (II R. 665.)

(d) That the findings and order of the Public Service Commission were not sustained by sufficient evidence and were contrary to law.

(e) That Citizens Gas had no power to enter into the agreement contained in the lease permitting the Public

Service Commission to fix rates at which it should sell gas. (II R. 656.)

(f) That the obligation assumed by Citizens Gas under the terms of said lease to pay interest on the bonds and dividends on the stock of Indianapolis Gas impaired the obligation of the contract existing between Citizens Gas and plaintiff and other stockholders of that company in that it prevented Citizens Gas from executing a mortgage at the end of the franchise term in order to pay the stockholders of that company the par value of their stock and accumulated dividends thereon.

The defendants Public Service Commission, Indianapolis Gas and the Citizens Gas demurred to each paragraph of the complaint, which demurrers were sustained by the Court. The City did not file a demurrer but filed an answer in general denial.

Prior to the entry of final judgment, plaintiff dismissed as to the City as a party defendant and the following order book entry was made in connection with such dismissal:

> "Come now the parties and the plaintiff now dismisses the action as against the defendant, City of Indianapolis, upon which dismissal the court now renders judgment for costs against the plaintiff." (Stip. II R. 616, 625, 626, offered II R. 327.)

The plaintiff elected to stand upon its complaint and to abide the ruling of the court upon such demurrers and judgment was rendered against him. *The City was not a party to the judgment rendered in the case.*

Neither Chase, any other trustee under the Mortgage Deed of Trust executed by Indianapolis Gas, nor any bondholder of Indianapolis Gas was a party plaintiff, defendant or intervenor in said *Fishback* case. (Stip. II R. 626, offered II R. 327.)

Fishback prayed an appeal from the decree of the Marion Superior Court to the Supreme Court of Indiana which dismissed the appeal because not perfected in time

(*Fishback v. Public Service Commission of Indiana, et al.*, 193 Ind. 282.)

The *Fishback* judgment is not *res adjudicata* because:

1. Neither the City, any trustee under Indianapolis Gas Mortgage nor any bondholder of Indianapolis Gas was a party to the final judgment. There is, therefore, a total lack of mutuality of estoppel.

2. The issues in the *Fishback* case were wholly different from the issues in this case and the question of the validity and enforceability of the lease against the City was not and could not have been decided in that case.

3. The capacity in which the parties sued and were sued negatives any claim of estoppel by judgment. No claim was asserted in the *Fishback* case that any public charitable trust existed.

4. The transfer of the trust res to the City on September 9, 1935, has so altered the rights of the parties as to prevent the judgment in that case being an adjudication in this.

(b) The Williams Case (206 Ind. 448).

The *Williams* judgment is not *res adjudicata*, because:

1. The issues in the *Williams* case were essentially different from the issues in this case.[3] The enforceability

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[3] The case of *Troxell v. Delaware R. Co.*, 227 U. S. 434, 440, cites the leading case on the question discussed above, viz.: *Cromwell v. Sac County*, 94 U. S. 351, 353, 24 L. ed. 195, 198, 199. In that case an action was brought on four bonds of Sac County and four interest coupons. In order to defeat the action the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by another person but prosecuted for the sole benefit of the plaintiff in the last case. The issue of whether the plaintiff was a good faith purchaser of the bonds had not been but could have been litigated in the prior action. The United States Supreme Court in holding that the judgment in the first case was not *res adjudicata* said:

of the lease against the City and the right of the initial trustee to bind the City to the terms of the lease were not actually litigated and could not have been litigated under the issues in the *Williams* case.

2. The transfer to the City of the trust res on September 9, 1935, creates a situation which so alters the rights of the parties as to prevent a successful assertion of *res adjudicata*. When the *Williams* case was finally decided, the City had not taken over the trust res and until that was done the questions here involved were not in issue. No attempt was made to obtain a declaratory judgment against the City in respect of any *obligation* supposed to be imposed on it under the terms of the lease.

3. Although Indianapolis Gas and its mortgage trustees the predecessor of Chase and the City were co-defendants, and although the City formally asserted in a pleading filed that the validity of the public charitable trust was in no wise affected by the question of whether the lease was valid or invalid, Indianapolis Gas and its mortgage trustees tendered no issue to their co-defendant, the City, in respect of the enforceability of the lease against it. Under settled rules of law, the judgment cannot adjudicate the issues here presented as between such co-defendants.

There is nothing in the language of the Supreme Court in the case of *Williams v. Citizens Gas Co.*, 206 Ind. 448, which sustains the theory of Chase's counsel that that case disposed of the questions here involved.

(Continued from p. 75)

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The following language of the Supreme Court shows clearly that the issues now presented were not involved or disposed of in that case.

> "If the lease was improvident from the standpoint of the lessee in that the consideration was excessive in view of the value of the use of the assets acquired under the terms of the lease, no facts are alleged to support such a conclusion. And if such a conclusion were justified, the complaint does not make out a case for equitable relief of cancellation and 'recapture' of the rentals paid over a period of seventeen years during which the Citizens Gas Company had the use of the physical equipment and the benefit of the income derived from this use. Further it was within the jurisdiction of the Public Service Commission to consider and approve the lease and the complaint discloses that the Public Service Commission did approve it. *The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the Commission in approving the same.*" (Our emphasis.)

The suit was brought by Williams suing as an inhabitant and taxpayer on behalf of himself and other beneficiaries of the public charitable trust. The complaint proceeds upon the theory:

(a) That a public charitable trust exists in the property of the Citizens Gas and that the plaintiff is entitled to a determination that such a trust exists.

(b) That a conspiracy was formed in 1913 to destroy this public charitable trust and it is alleged that among the overt acts of this conspiracy were procuring the enactment of the Public Service Commission Act of Indiana, the approval by that Commission of the lease between the Indianapolis Gas and the Citizens Gas, the surrender by the Citizens Gas of its franchise and the acceptance of an indeterminate permit, the obtaining of a decree from the United States District Court at Indianapolis enjoining the enforcement of confiscatory rates and the like.

(c) It is alleged that the lease between the two companies was void because:

1st. It was in contravention of the contract clause of the Federal Constitution.

2nd. That inasmuch as the Public Service Commission Act was invalid it had no authority to approve the lease and that its approval was a denial of due process in violation of the Fourteenth Amendment.

3rd. That the lease was the result of a conspiracy, the object and purpose of which was to destroy the Citizens Gas for the benefit of the Indianapolis Gas.

The relief sought was a determination that a public charitable trust existed in the property of the Citizens Gas; that receivers be appointed for the property of that company and of the Indianapolis Gas and that all rentals paid to the Indianapolis Gas be recovered from it.

There was not presented in the complaint any issue whatever on the question of the validity of the lease after the transfer to the City or was there any issue presented that because of the length of the term involved the lease was invalid. Phrased in another way, the court was not asked to pass upon the question presented in subdivision 32 of the lease (I R. 79, 80) wherein it is provided:

> "In the event it should be determined by a court of final jurisdiction that this contract is *ultra vires* or void because of the length of the term created, and that such term is in excess of the authority of either party hereto to contract, then this lease shall nevertheless be binding upon the parties hereto for the lengthiest term which the parties hereto might lawfully contract."

The Supreme Court of Indiana had before it only the allegations of the complaint. This is evidenced by some of the language from the opinion, a few excerpts of which we quote:

1. "In respect of the *alleged* invalidity of the lease * * *

2. *It appears from the complaint* * * *

3. The *complaint discloses*

4. The *complaint* does not make out a case."

The decision is the law of Indiana only so far as it goes in view of the facts before the court on which the decision is based.

(c) The Cotter Case (46 F. 2d 855).[22]

The *Cotter* case was not pleaded as *res adjudicata*. Apparently some weight was given by the Circuit Court of Appeals to the admission made by former counsel for the City in the answer in that case that the lease in question was valid. (113 F. 2d 217, 223.)

In the first place, the validity of the lease was not at issue in the *Cotter* case. In the second place, the answer was signed only by counsel, was unverified, and there was no attempt to show that the information contained in the answer could have been furnished solely by the City.

Under such circumstances it is settled law that the answer could not bind the City.

Habirshaw etc. Cable Co. v. Cable Co., 296 Fed. 875.

(d) The Todd Case.

The Todd judgment is not *res adjudicata* because:

1. Neither Indianapolis Gas, its mortgage trustee, nor any of its bondholders were parties in any capacity. There is a total lack of mutuality of estoppel. Had the enforceability of the lease against the City been in issue and had the Court decided that the lease was unenforceable, none of these plaintiffs would have been bound by the judgment. How then can they successfully claim the benefit of it?

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[22] The *Cotter* case and the *Todd* case were heard together on appeal and only one opinion written in both cases.

2. The cause of action in the *Todd* case, and the cause of action in this case, are essentially different and the question of the enforceability of the lease against the City was not litigated, and could not have been litigated, under the issues presented in the *Todd* case.

3. The estoppel of a judgment extends only to the facts in question as they existed at the time the judgment was rendered and does not prevent an examination of the same questions even between the same parties, where at a later time the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. At the time of the entry of the decree in the *Todd* case there was no existing controversy in respect of the enforceability of the lease between Indianapolis Gas and its bondholders on the one side and the City on the other. The *Todd* case was finally disposed of on May 29, 1930. The facts and circumstances have altered and changed since the date of the decree in the *Todd* case by reason of the transfer of the trust property on September 9, 1935, to the City as successor trustee and because of the fact that shortly before the time of such transfer and in July, 1935, the first indication of a controversy arose as to the binding effect of the lease on the City.

4. The issues tendered by the bill of complaint in the *Todd* case were (Stip. 30 II R. 677-717, offered II R. 327):

(a) That the original agreement between the City and the Citizens Gas contained in the franchise contract of 1905 was abrogated and annulled when the Citizens Gas surrendered that franchise and accepted an indeterminate permit from the Public Service Commission.

(b) That the surrender of the franchise and the acceptance of a permit created a new contract between the State and the Citizens Gas, one of the terms of which was that the City should have the right to acquire the property of the defendant company at a value to be determined by the Public Service Commission in a proper proceeding.

(c) That an Act of the Indiana General Assembly of 1929, purporting to legalize all of the provisions of the Articles of Incorporation of the Citizens Gas and particularly those in respect of the mode of acquiring the plant and property of the Citizens Gas by the City, resulted in an impairment of the obligations of the new contract above referred to, in violation of the Constitution of Indiana and of the United States.

(d) That the franchise contract of 1905 merely gave an option to the City to purchase the property of the Citizens Gas Company which option violated the rule against perpetuities.

5. No pleading was filed in the *Todd* case asserting either the validity or invalidity of said lease. There was only one reference to said lease in the bill of complaint, which is found in Subdivision IV thereof (which subdivision describes the property of the company). (Stip. 30 II R. 677, 680, offered II R. 327.)

On the question of *res adjudicata* the rule in Indiana is that no party may invoke the doctrine of former adjudication unless he has tendered to the party against whom the doctrine is invoked, an issue against which the latter could have demurred or pleaded.

Maple et al. v. Beach, 43 Ind. 51, 58;
Jones v. Vert et al., 121 Ind. 140, 141;
Kitts v. Willson, 140 Ind. 604, 610.

After the decisions on which the Circuit Court of Appeals and Chase rely as being *res adjudicata* were rendered, the City took over the property. Prior to the date the property was taken over, September 9, 1935, the rights of the City had not accrued and thus its rights were not and could not have been adjudicated.

In *Kitts v. Willson*, 140 Ind. 604, 610, one Duncan in 1874 brought an action against Cravens, Willson and the administrator of John Mullan, deceased, to set aside as

fraudulent the conveyance of Kitts to Cravens. He succeeded, and Willson paid the judgment. In 1887 Duncan quitclaimed to Sarah, widow of David Kitts. Sarah then brought an action for partition which was decided against her. She then brought this action in ejectment. Appellees contended that the questions in the second case were adjudicated in the partition suit. The Court said:

> "With this contention we can not agree. In that case the issues were not the same as in this, nor was appellant a party in the same right as she is here. There appellant sued for partition as widow of David H. Kitts and heir of her own children; here she sues for possession as grantee of Harden Duncan. Her rights in this case, if any there be, had not accrued at the time of bringing the suit in partition, and would have been hostile to her rights in that case. In this case she steps into the shoes of Duncan, who was not a party to the former suit; whatever rights he would have, if appellant here, such rights, and no other, she has. The fact that she is the widow of David H. Kitts neither adds to nor takes from her right to recover in the case at bar.
>
> There is no doubt that the decree in the partition suit was conclusive against appellant as to any interest she might claim in the land at the bringing of that suit; and by it the property was 'freed from all claims (of hers) of whatsoever nature existing at the time of the institution of the suit.'
>
> But before the rule of former adjudication can be invoked it must appear that the thing demanded was the same; that the demand was founded upon the same cause of action; that it was between the same parties, and found for one of them against the other in the same quality. The party must not only be the same person, but he must also be suing in the same right."

The benefit to be derived from a judgment must be mutual before it can operate as an estoppel.

In *Maple et al. v. Beach*, 43 Ind. 51, 58, the Court said:

> "Another principle which governs in the admissibility and effect of judgments as evidence is, that the

binding force and effect of the judgment must be mutual. Prof. Greenleaf, speaking of judgments as evidence, says: 'But to prevent this rule from working injustice, it is held essential that its operation be mutual.' Vol. 1, Sec. 524. Mr. Starkie says: 'It is a general rule, that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be mutual. This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence, the parties must be the same, for then the benefit and prejudice would be mutual and reciprocal. Where the parties are not the same, one who would not have been prejudiced by the verdict can not afterward make use of it, for between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point.'"

Measured by these rules none of the cases relied on by the Circuit Court of Appeals (IV R. 1300) and by Chase is *res adjudicata*.

Furthermore in none of the cases relied upon by Chase did it or its predecessor Trustee make an issue with its co-defendant Citizens Gas as initial trustee or with the City as successor trustee either directly or through its mortgagee, Indianapolis Gas. Under the Indiana law, for that reason alone, none of the judgments could be *res adjudicata*.

In *Whitesell, et al. v. Strickler, et al.*, 167 Ind. 602, 615, 616, the above rule is announced. The Court said:

"The facts pleaded in the answers last above described fall far short of being sufficient as answers of former adjudication. The general rule is that the judgment in the former action settles all matters of controversy involved in the issues between the parties to the action; that is, all matters litigated, or which might have been litigated within the issues as they were made, or tendered by the pleadings in the case, but not matters which might have been litigated under such issues formed by additional pleading. *Findley v. Cathcart* [1905], 164 Ind. 470, [illegible] *Duncan v. Hedekin*

(1866) 26 Ind. 378. 'The party who invokes the doctrine of former adjudication must be one who tendered to the other an issue to which the latter could have answered or pleaded.' *Jones v. Vert* (1889), 121 Ind. 140, 16 Am. St. 379."

Since no issue was made among the co-defendants in any of the cases none of them is *res adjudicata.*

None of the cases is *res adjudicata* under the rules announced by *this* Court.

In the recent case of *Pepper v. Litton*, 308 U. S. 295, 302, 84 L. ed. 281, 287, this Court had before it the question of whether or not a judgment of a Virginia court was *res adjudicata.*

Litton, who headed a one man corporation, had caused Dixie Splint Coal Company to confess a judgment in his favor in the amount of more than $33,000 representing accumulated salary claims. Pepper, in 1931, had brought suit in the State Court against the Dixie Splint Coal Company and Litton for an accounting. In 1934, Pepper obtained a judgment against the Company for $9,000.00. Execution was stayed pending an appeal, but the defendant never appealed and while the execution was not stayed Litton caused an execution to issue on his confessed judgment. The property was advertised and sold to him for $3,200.00. Litton caused a new corporation to be formed to which he transferred the property he had acquired at the execution sale. On September the 14th, 1934, Dixie Splint Coal Company filed a voluntary petition in bankruptcy. On June 13th, 1934, Pepper had instituted a suit in the Virginia State Court to have a written judgment declared void. On June the 15th, the day following the sale under the Litton execution, the Sheriff instituted an interpleader action joining Litton, Pepper and the Coal Corporation and alleged that that corporation had a prior lien on all the property sold for one of its debts. Litton and Pepper admitted this. An order was entered directing payment of the corporation's claim.

Thereafter, the Trustee, with the permission of the Bankruptcy Court, moved in the State court to set aside the judgment and to quash the execution thereof on the ground that the judgment was void since it had not been confessed in the manner required by the Virginia statute. The court concluded that the Litton judgment was void, but denied the motion on the grounds that the Trustee was estopped to challenge it. It was also held that Pepper had admitted the validity of the judgment and that since Litton had acquired all the remaining claims against the estate the Trustee was in reality representing only Pepper. Therefore, since Pepper was estopped so was the Trustee. The judgment was affirmed by the State supreme court.

The question of the allowance of the Litton judgment came before the bankruptcy court on exceptions previously made by Pepper. "That court concluded that the decision by the state court that the Trustee was estopped to attack the Litton judgment there, did not prevent the Bankruptcy Court from considering its validity." The district court disallowed the Litton claim and directed the Trustee to recover for the benefit of the estate the property or its value which Litton had purchased at the execution sale on June 14, 1934. The Circuit Court of Appeals reversed the District Court and held that the decision in the State Court was *res adjudicata* in the bankruptcy proceedings.

In reversing the judgment of the Circuit Court of Appeals and affirming that of the District Court, Mr. Justice Douglass said:

> "In the first place, *res judicata* did not prevent the District Court from examining into the Litton judgment and disallowing or subordinating it as a claim. When that claim was attacked in the bankruptcy court Litton did not show that the proceeding in the state court was anything more than a proceeding under Virginia practice to set aside the judgment in his favor on the ground that it was irregular or void upon its face.

He failed to show that the judgment in the state court was conclusive in his favor on the validity or priority of the underlying claim, as respects the other creditors of the bankrupt corporation—a duty which was incumbent on him. On the pleadings in the state court the validity of the underlying claim was not in issue. Nor was there presented to the state court the question of whether or not the Litton judgment might be subordinated to the claims of other creditors upon equitable principles. The motion on which that proceeding was based challenged the Litton judgment on one ground only, viz., that it was void *ab initio* because it was not confessed by Dixie Splint Coal Company in the manner required by the Virginia statute and because P. H. Smith did not have either an implied or express power to confess it. In other words, in the state court, under the pleadings and practice, the only decree which was asked or could be given in the plaintiff's favor was for cancellation of the judgment as a record obligation of the bankrupt. It is therefore plain that the issue which the bankruptcy court later considered was not an issue in the trial of the cause in the state court and could not be adjudicated there."

It is apparent under this recent decision of this Court that since the precise point of the validity of the 99-year lease against the City as successor trustee was not decided in either the *Fishback*, *Williams*, *Cotter* or *Todd* cases, none is *res adjudicata* of the issues here in question.

CONCLUSION.

The City submits that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX.

Section 85 of Chapter 129 of the Acts of the Indiana General Assembly 1905, page 271 (48-1507 Burns' Indiana Statutes Annotated, 1933):

"No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for supplying the city with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse on such terms and for such times, not exceeding the term fixed by section 254 (Sec. 48-7302, Burns') of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take effect, and, if so approved, shall immediately become effective: Provided, further, That nothing herein contained shall prevent any such department from issuing any bond or other obligation expressly authorized by this act and provided for by ordinance."

Section 254 of Chapter 129 of the Acts of 1905, page 396 (48-7302 Burns' Indiana Statutes Annotated, 1933):

"Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities, or to build or extend railroads, interurban or street-car lines, telegraph or telephone lines, drainage or sewerage system, or other public conveniences, into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad,

interurban, street-car, telegraph or telephone service, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants: Provided, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years: And, provided further, That before any such contract shall be made by any city of the first, second, third, or fourth class such contract shall be first agreed to by the board of public works of such city, after which agreement, such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city."